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Endless Journey: Integration and the Provision of Equal Educational Opportunity in Denver's Public Schools: A Study of Keyes v. School District No. 1

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CASE NOTE

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A Study of *Keyes v. School District No. 1*

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Denver was the first non-Southern City to undergo extensive litigation over the desegregation of its schools. In this context, it has become a mirror for the way America deals with its most pressing social problem: the integration of minorities into the educational, political and economic mainstream through equal educational opportunity. This study examines the difficulties of implementing a desegregation plan that would result in a unitary public school system and developing a plan that would provide an equal educational opportunity to the large hispano minority. We concentrate upon the implementation efforts after 1976 when Judge Richard Matsch was assigned to the case. The liability phase and the initial implementation efforts have been chronicled in detail elsewhere.[1]

1. For a detailed description of the earlier years of the litigation, *see* PEARSON & PEARSON, *The Denver Case: Keyes v. School District No. 1*, in LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 167 (H. Kalodner & J. Fishman eds. 1978) [*hereinafter* cited as PEARSON].

I. THE SETTING
A PORTRAIT OF THE CITY

Since Denver was founded in 1858 by William Larimer[2] as a stopping point for victims of 'gold fever' infected by the discovery of the mineral at Pike's Peak, it has served as the gateway to Colorado and the Rockies.[3] Today, Denver is a major metropolitan area. Its problems and prospects reflect more of urban American than of the West.[4]

An economic boom in the last quarter of the nineteenth century drew thousands of migrants into Denver. It transformed the pattern of city life, and ensured that Denver would be the financial, commercial, and manufacturing center for the Rocky Mountain West.[5] The increasing population led to the expansion of the Denver metropolitan area, a trend that continues today.

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2. William Larimer was a Pennsylvania politician, speculator and town siter who founded towns in the wake of mineral discoveries. Larimer had previously failed to make Larimer City in Nebraska the major metropolis of that state. Denver was founded on the right bank of Cherry Creek where it meets the Platte River. According to Denver folklore the site was already occupied and claimed by the St. Charles Town Association. Larimer is reputed to have plied the guard of the St. Charles Town Association with drink who then signed over the rights to the town. By 1859 Denver had a population of 2,000. It rose to 4,500 in 1860 but dropped to 3,000 after the Civil War. C. ABBOTT, S. LEONARD & D. MD COMB, COLORADO: A HISTORY OF THE CENTENNIAL STATE 52-3, 233 (rev. ed. 1982) [*hereinafter* COLORADO].

3. Denver's success as the major metropolitan area in the state and far west was assured in the last quarter of the nineteenth century by the railroads. The Union Pacific, Rock Island, Burlington, Santa Fe, and Missouri Pacific ran through the city and brought thousands of immigrants.

4. Denver and Denver Metropolitan Area Population Growth.

TABLE 1 (ACCOMPANYING FOOTNOTE 4)
DENVER AND DENVER METROPOLITAN AREA POPULATION GROWTH

	1870	1880	1890	1900
Denver				
(Metropolitan area*)	4,759	35,629	106,713	140,500
	1910	1920	1930	1940
Denver	213,381	256,491	287,861	322,412
(Metropolitan area*)	(219,314)	(264,232)	(330,761)	(384,372)
	1950	1960	1970	1980
Denver	415,786	493,889	514,678	491,396
(Metropolitan area*)	(563,832)	(929,383)	(1,227,529)	(1,619,921)

* 1910-1940: metropolitan district; 1950: standard metropolitan area; 1960-1980: standard metropolitan statistical area.
Source: COLORADO, *supra* note 2, at pp. 335-36.

5. COLORADO, *supra* note 2, at 236-40.

In the first two decades of the twentieth century, Denverites moved outwards creating early suburbs that as today, served to deepen the city's social, economic, and ethnic divisions. Newer immigrants—predominantly from Southern Europe and Scandinavia—lived in ethnic enclaves near the stockyards, foundries, railroad shops, packing plants and smelters where they worked.

The large immigrant population in Denver led to a growth in nativism. In the 1920s, the Ku Klux Klan had greater popular strength in the city and even acceptance by the political establishment. In this period and the following two decades, the key to politics was a conservative 'fundamentalism' reflecting small town values.[6] For instance, typical of the West in the 1930s, Colorado rejected the New Deal.

Between 1940 and 1970, the population and economy of Denver expanded greatly. The state attracted new businesses and became a sophisticated service economy. A renewed interest in the environment and the outdoors created the tourist industry and attracted new residents. An influx of high technology businesses benefitted the metropolitan region rather than Denver proper, leading to an outflow of middle class whites to the suburbs. Between 1950 and 1970, the suburbs grew by two and one half times. Denver's population grew by 26 percent. Attempts by Denver to annex suburban towns were rejected.[7]

The Denver metropolitan area enjoyed substantial growth during the 1970s, spurred in part by the energy boom and by a national demographic shift to the Sun Belt.[8] The population of eight counties in the Denver metropolitan area: Denver, Adams, Arapahoe, Boulder, Clear Creed, Douglas, Gilpin and Jefferson, grew steadily during the decade. These counties showed a population gain of 31 per cent, from 1,237,529 in 1970 to 1,691,921 in 1980.[9] Denver's population declined, however, dropping 4.5 per cent from 514,678 in 1970 to 491,396 a decade later.[10] Its population had increased in the 1960 to 1970 decade from 493,889 to 514,678.[11]

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6. *Id.* at 267-77.
7. *Id.* at 280-83.
8. *Id.* at 315-17.
9. DENVER REGIONAL COUNCIL OF GOVERNMENTS, PROFILES OF 1970-1980, Socio-Economic Change by County & Census Tract I (Apr. 1983) [*hereinafter* Denver Regional Council].
10. *Id.*
11. Table 1, *supra* note 4.

Jefferson County, a suburban area west of Denver, enjoyed the highest absolute growth in the region, increasing its population by 139,018 to 371,753 from 1960 to 1980.[12] According to a survey of the eight-county region conducted by the Denver Regional Council of Governments, the number of households earning from $50,000 to $74,999 increased by 233 per cent in Jefferson County alone—a statistic that indicates where many affluent people were moving to in the 1970s.[13]

MINORITY PATTERNS

Blacks have lived in Denver from its earliest years. Some, but not all, were ex-slaves. They clung to their rights and at least initially, had some political influence.[14] From a population of one thousand in the 1880s, Denver's black population grew to six thousand in the 1910s, concentrated in the Five Points area east of the business district. While legislation prohibited discrimination in public accommodations, blacks nevertheless, usually were excluded from white hotels, restaurants, and schools. Their occupational opportunities were limited to a few menial occupations: domestic servants, waiters, or pullman porters.[15] Within their own isolated enclave of Five Points, blacks had limited vertical mobility, such as ownership of property and small businesses and minor political patronage for delivering the black vote. The Second World War created job openings in skilled factory jobs in the local defense industry. Governmental offices and military facilities established in the 1940s also provided employment. Since the Second World War, a major aspiration of the black community, in Denver, has been progress toward middle class status.[16]

The first Mexican immigrants were brought into the state, in the earliest years of the twentieth century, by the Colorado Fuel and Iron Corporation to work in its steel mills.[17] At the same time, sugar beet companies sent agents to areas around the Rio Grande to recruit laborers for their farms. Because of the high costs of recruitment, these

12. Denver Regional Council, *supra* note 9, at 1.
13. *Id.* at 4.
14. COLORADO, *supra* note 2, at 205-09.
15. *Id.* at 288.
16. *Id.* at 302-04.
17. *Id.* at 295-96.

companies in the 1920s encouraged migrant Mexicans to settle in the state. By 1930, 13,000 Coloradeans were born in Mexico, and another 28,000 were hispanics from New Mexico. Most settled in rural areas and small towns where they faced segregation, prejudice, and harassment.[18]

Many hispanos left Colorado during the depression years. Others moved into Denver where they had to compete, usually unfavorably, with the already existing black community. In 1940, the average family income for blacks was 62 percent that of whites. The average income of hispano families was less than half that of the white level.[19] There were some official gestures towards recognizing hispano poverty in the 1940s and 1950s, but discrimination against all minorities was the norm.

Today, hispanos are the largest minority group in Denver. In 1960, they comprised 12.2 percent of the total population. By 1970, their number had risen to 16.8 percent of the population,[20] and by 1980, hispanos comprised 19 percent of the city's population.[21] In 1964, hispanos made up 17 percent of the school population, 19.1 percent by 1975, and 32 percent by 1981.

The hispanic population has always been a highly disadvantaged group.[22] The median income, education, and percentage classified as 'professional' of hispanos are the lowest of any ethnic group in Denver.[23] Twice as many hispanos occupied Denver's urban poverty area in the northern half of the city. Yet, when hispanos reached middle class economic status, and moved into white neighborhoods, they did not receive the hostility directed at blacks.

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18. *Id.* at 297-98.

19. *Id.* at 299. Forty one percent of white families owned their own homes; thirty-four percent of black families did, but only eleven percent of Hispanic families owned their own homes. Infant mortality in 1940 was 65 deaths per 1,000 live births for blacks, 71 for whites, and 205 for Hispanic.

20. PEARSON, *supra* note 1, at 169.

21. Branscombe, *New Desegregation Plan Unveiled*, Denver Post, Mar. 12, 1983, at 1B.

22. PEARSON, *supra* note 1, at 169. One interviewee stated that discrimination against Hispanics has been worse than against Blacks. Interview with George Bardwell, researcher for plaintiffs, in Denver (Sept. 16, 1984) [*hereinafter* Bardwell interview]. A hispanic felt discrimination against Blacks had been worse. Interview with Bernard Valdez, former member Denver School Board, in Denver (Sept. 12, 1984) [*hereinafter* Valdez interview]. The cultural differences and histories of the two groups are great. Thus, the impact of the discrimination has been played out in different ways. Black Denverites are more middle class as a group than hispanic residents of the city or Blacks in other urban cities.

23. PEARSON, *supra* note 1, at 169.

Discrimination has not had the same intergenerational impact on hispanos as it has had on blacks. It has been suggested that upwardly mobile hispanos are more similar to earlier generations of European immigrants. Hispanos' problems are different from blacks', their needs are not so much to breach long-established racial barriers, but to mediate conflicts between very different cultures.[24] Until recently, hispanos have not been involved in the political process. One of the most significant developments of the present decade is the emergence of the hispanic community as a political force. Many hispanos opposed the school integration suit as a form of cultural hegemony.[25] During the litigation, a group of hispanos unsuccessfully sought to intervene to stop the desegregation of their neighborhood elementary school and to escape from the busing orders.[26] Many in the hispanic community favored better education rather than more integration.

There has not been a strong political alliance between the hispano and the black community. In certain schools where blacks and hispanos comprised large percentages of the student body, there was polarization and conflict.[27] The tri-ethnic mix has complicated desegregation in Denver. The constitutional demands of desegregation do not always correlate with the needs and aspirations of the hispanic community.

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24. COLORADO, *supra* note 2, at 303.

25. In the words of Bernard Valdez, who served on the school board in the 1970s:

> You see Hispanics as a group have never been very much pro busing, pro integration, forced integration. They believe in integration, but they believe in it taking place more naturally. And the reason for this is Hispanics haven't had the degree of discrimination that Blacks have had. And there's a different psychic about Hispanics' feelings about themselves versus what Blacks feel about themselves. It's difficult to explain that unless you're one, very difficult. As a consequence, they don't feel the same compulsion to be mixed with Anglos . . . I think by and large, Hispanics think they can do it even in their segregated communities. They feel their segregation is voluntary. And that has something to do with a cultural pattern and their family strains and all of those things go way back . . . centuries. So that gives a different psychologic evaluation to where you are . . . . Then comes busing, which catches them in the middle. They're really not a part of the whole court at all, they get caught in the middle. Valdez interview, *supra* note 22.

26. *Garcia v. Bd. of Ed.*, 573 F.2d 676 (10th Cir. 1978). The Circuit Court granted the school board's motion to dismiss because the plaintiffs had received adequate notice of the main action and were represented. Collateral attacks on class action judgments have not been encouraged. *See* note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974).

27. Interview with Kay Schomp, member Denver Board of Education, 1971 to 1973 in Denver (Sept. 12, 1984) [*hereinafter* Schomp interview].

HOUSING PATTERNS

In 1970, blacks were concentrated in inner-city neighborhoods, particularly Five Points, which extended east from the central business district.[28] Since the end of World War II, blacks have also moved slowly east from the Five Points area into the Park Hill area, a trend that formed the underpinnings of the *Keyes* case. These inner-city areas were all fifty per cent or more black. Smaller black concentrations extended east from Denver into the suburban city of Aurora and northward along the Platte River.[29]

The black population was much more dispersed in 1980, but overall residential patterns were similar to the previous decade. Neighborhoods east of the business district remained largely black. A major difference, however, was the movement of blacks into a number of the older post-war neighborhoods in Aurora. In addition, a black population appeared in southeast Denver, traditionally an all-white neighborhood.[30] Hence, the movement of blacks into Park Hill and the lawsuit in 1969 culminated a trend that had begun more than twenty years earlier.

Residential segregation against hispanos has always been less complete than for blacks. The hispanic concentrations are west of the business district. The hispanic neighborhoods are laid out in a north-south pattern along some of the major north-south transportation lines. As a result, few neighborhoods in Denver have large concentrations of both blacks and hispanos. Also, hispanos tend to be more dispersed throughout the city, due in part to the fact that they out-

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28. F. JAMES, B. MCCUMMINGS & E. TYNAN, DISCRIMINATION, SEGREGATION & MINORITY HOUSING CONDITIONS IN SUNBELT CITIES: A STUDY OF DENVER, HOUSTON & PHOENIX 46 (1983) [*hereinafter* Discrimination, Segregation].

29. *Id.* at 49.

30. James Reynolds, speaking at a 1981 conference on the relationship between housing and school integration, offered an insightful history of black residential patterns in Denver:

> Before World War II the black population was small, and resided in the vicinity of Five Points. Starting in 1946, ex-military men both black and white began to seek homes in Denver, where they had trained during the war. For many blacks it was their first experience outside the south where they had grown up.
>
> The black neighborhood began to expand and press against the boundary that divided the black and white communities. The area under the greatest pressure was between 23rd Street on the south, 36th Street on the north, and High Street on the east. As the black population increased, it pressed . . . . White congregations whose churches were caught in the path of the movement sold their buildings and fled south.

Address by James Reynolds, Conference on Relationship Between Housing and School Desegregation, sponsored by Community Research Center, University of Colorado, at Denver (Jan. 17, 1981). In 1980 blacks constituted 12 percent of Denver's population.

number blacks.[31] By 1980, hispanos had fanned out into suburban neighborhoods, to the north, south and southwest parts of Denver.[32]

Denverites point with particular pride to their history of housing integration. Grass roots organizations have worked diligently to integrate neighborhoods throughout the city over the past decade.[33] As a result, there is a good deal of open housing in Denver, probably more than in many of the older, more established cities whose neighborhoods often defy integration.[34]

Denver is no stranger to integrated neighborhoods, which began to appear in the 1950s. The Greater Park Hill Action Committee, a catalyst behind the surge toward filing the lawsuit, grew out of an integrated, middle class neighborhood, Park Hill.[35] This is not to suggest that integration is a city-wide phenomenon. Separation of the races still exists. Southeast Denver remains predominantly anglo, for example. One of the most interesting offshoots of the lawsuit, however, has been the work of the Denver Community Housing Resource Board, which has succeeded in bringing about increased residential integration[36] while working out of a tiny office shared with neighborhood groups.[37]

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31. DISCRIMINATION, SEGREGATION, *supra* note 28, at 49.

32. *Id.* at 50.

33. Interview with Kathy Cheever, Director, Denver Community Housing Resource Board, in Denver (Sept. 15, 1984) [*hereinafter* Cheever interview].

34. Interview with Monte Pascoe, Denver attorney and school board candidate, in Denver (Sept. 13, 1984) [*hereinafter* Pascoe interview].

Pascoe said Denver's relative youth as a city has helped foster integrated housing: "Compare it [Denver] to other cities, it's clear that we don't have those incredibly deep ethnic roots in this city. It's a somewhat new city. You're not dealing with 150 years of people living in one location."

Carol Ruckel, President of the Denver Parent-Teacher-Student Association, agreed:

> Of course, people in Denver keep saying Denver [is] different. And it really is. The social atmosphere is very different. Has been for thirty years. We have had, since World War II, a fairly large black population. It is a well-educated population. It is a relatively affluent population. And they have been much more integrated into our society as a whole in the city than in other cities, especially when you head back east . . . . We're doing a lot with open housing here.

Interview with Carol Ruckel, President, Denver-Parent-Teacher-Student Association, in Denver (Sept. 15, 1984) [*hereinafter* Ruckel interview].

35. Interview with Robert Colwell, former Denver high school principal, in Denver (Sept. 12, 1984) [*hereinafter* Colwell interview].

36. Cheever Interview, *supra* note 33.

37. Cheever explained the resource board's objectives in an interview: "We have a community housing-community schools project which we started at the time of the court order, when people said the problem is really a housing problem, not a school's problem, and then they went

Because many people, black and white, dislike busing, the notion of an integrated neighborhood has some appeal. In an October 11, 1983 newsletter, the resource board said its goal was to "develop cooperative fair housing solutions in voluntary affirmative marketing."[38] Approximately eight schools previously paired for purposes of school integration were returned to neighborhood based enrollments, because their neighborhoods became more integrated.[39]

Despite such optimistic appraisals of Denver as a progressive, integrated city, the Colorado Civil Rights Division recommended in 1984 "that the Board of Education assume a leading role in influencing the Denver Housing Authority to begin and implement a program of affirmative desegregation."[40] Other Denver organizations have joined the effort to promote open housing as a means to reduce busing, including the Colorado Council Parents Teachers Students Association, which adopted a fair-housing resolution, as did the Denver Board of Realtors.[41]

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off and did things with the schools, and nothing about housing." Cheever Interview, *supra* note 33.

38. Denver Community Housing Resource Newsletter 1 (Oct. 11, 1983). Cheever said:

> Using fliers, slide presentations and civic groups, among other approaches, the Resource Board tries to promote publicity about a particular neighborhood's strengths. One flier, for instance, stressed that DPS students scored higher than the national average on SAT tests. The goal was to provide factual information about city schools while dispelling myths and stereotypes about life and public education in urban Denver.

Cheever added she met with more success when a neighborhood has had grassroots organizations familiar, and supportive of, integration. "I think the greatest success seems to be in the neighborhoods where there's been some support of integration for a long time. And the Greater Park Hill area, which you've heard about . . . it makes it easier to work within the neighborhood." Cheever Interview, *supra* note 33.

39. "The court has allowed naturally integrated neighborhoods to have walk-in schools. And so, feeling we have a lot of people saying we have busing, this is one way to say, O.K., we do have an alternative." Cheever Interview, *supra* note 33.

40. Letter from State of Colorado Civil Rights Division to Judge Richard P. Matsch (May 30, 1984). The letter added, "We strongly recommend that DPS be ordered explicitly to work actively with DHA and HUD to reduce minority or majority concentration in DHA projects and in assisted housing programs throughout the city."

41. Report of a Conference on Community Housing-Community Schools 9 (Jan. 17, 1981) [*hereinafter* Community Housing].

In May 1983, a developer and DPS entered into a unique agreement that promised at least 20 percent of the residents in the new development would be minority. DPS, in turn, would build an elementary school in the area. Green Valley Ranch, as the development is called, is a 3,000-acre parcel, and the last major undeveloped parcel of land in northeast Denver. Under the agreement, the developer would use a variety of approaches to encourage 'short and long-term' affirmative planning. A 20 percent minority base would be required at the outset, with that level rising to 30 percent, thus guaranteeing an integrated school-age population. The developer's success in integrating the area would result in the construction of more schools in the area. Press Release, issued by Office of Marshall Kaplan, Dean of Graduate School of Public Affairs, Uni-

Despite the strides the city has made in open housing, segregative barriers remain, one of which is subsidized housing. A speaker at the 1981 Community Housing Community Schools conference was Dr. Gary Orfield, an expert witness in the lawsuit, who said that subsidized housing contributed heavily to school segregation:

> . . . we find that subsidized housing in the Denver metropolitan area has a substantially negative effect on its schools. Eighty-two percent of the black families living in subsidized housing in metropolitan Denver live inside the city of Denver in a school district that is almost sixty percent minority. . . . If you look at where the whites are living in subsidized housing, about two-thirds of them are living in the suburbs.[42]

MINORITIES AND THE DENVER PUBLIC SCHOOL SYSTEM

Racially segregated schooling has been a continuing phenomenon in Denver. In the 1925-26 school year, 60 percent of the 789 black children enrolled in Denver's elementary schools attended either the Gilpin or Whittier Schools. When the Mitchell, Ebert, and 24th Street elementary schools were added, their combined enrollment accounted for 80 percent of all black students. One junior high school enrolled 85 percent of the black students, and Manual High School had 75 percent of the blacks. 80 percent of the 1,004 Spanish-speaking children attended five elementary schools. Only seven Spanish children were enrolled in junior high school and only two in day time high school![43] Even as minorities began to expand beyond their original enclaves, their racial isolation continued.

Over the years, the Denver Board of Education (hereinafter, the

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versity of Colorado, May 1983. This approach has the potential to bring about integration, both in schools and neighborhoods.

In an interview, DPS director of long-range planning, James Daniels, when asked how the agreement was proceeding, said, "It's going well so far." He also said the elementary school, which opened in September 1984, now has approximately 100 students, about twenty-three percent of whom are minority. The school can hold up to 870 students, and Daniels said he was pleased with the way the new homes had been marketed to minorities. Telephone Interview with James Daniels, Director Long-Range Planning, Denver Public Schools (Nov. 7, 1985).

42. Community Housing, *supra* note 41, at 9.

43. *Id.* Orfield also called for "coordination between school and housing problems," adding: "There has to be personal contact with minority families that gives them a real choice and escorts them out to the areas that they're not familiar with, both in subsidized markets and in the private market." *Id.* He also suggested that school officials be given the right to veto housing proposals.

Board) engaged in a variety of techniques that assured the continuance of racially unbalanced schools. The board situated schools in a manner that guaranteed their racial imbalance and purposefully failed to adjust school boundary lines to relieve overcrowding at predominantly white or black schools in a way that would have promoted integration. Rather, the Board adjusted boundaries to perpetuate racial isolation, used mobile classrooms to continue racial imbalance at certain schools, and assigned minority faculty principally to minority schools.[44] The Court in *Keyes* concluded that the Board had conscious knowledge of the racial consequences of its acts.[45]

In 1962, the Vorhees Special Study Committee on Equality in Educational Opportunity in the Denver Public Schools, recommended that the School Board consider racial, ethnic, and socio-economic factors in establishing school boundaries and selecting school sites. It also suggested that boundaries be set so as to establish heterogeneous schools and communities. Consequently, the Board adopted a resolution to implement the Vorhees Committee's recommendations.[46]

A second study group, the Berge Committee, established in 1966 to examine the policies of the Board with respect to the location of new schools in Northeast Denver, suggested changes that would further school integration.[47] In 1968 the Board passed the Noel Resolution, which directed the Superintendent of Schools to submit to the Board a comprehensive plan for the integration of Denver's schools. After this was done, the Board spent from January to April 1969 studying fourteen alternative plans, and then passed, by a five to two vote, resolutions 1520, 1524 and 1531. The resolutions were designed to eliminate segregation in the black schools in Park Hill, while stabilizing the composition of schools in racial transition.[48] In the past, the Board had passed several resolutions in favor of integrated education, but resolutions 1520, 1524 and 1531 differed by offering a concrete plan of affirmative action to lessen racial imbalance. This included

44. COLORADO, *supra* note 2, at 295.

45. Keyes v. School District No. 1, 303 F. Supp. 289, 290-95 (D. Colo. 1969) [hereinafter all citations to the case will be *Keyes* followed by the citation].

46. *Keyes*, 303 F. Supp. 289, 2910 (D. Colo. 1969); 313 F. Supp. 61, 65 (D. Colo. 1970).

47. *Keyes*, 313 F. Supp. 61, 65 (D. Colo. 1970).

48. The Berge Committee recommended that no new schools be built in Northeast Denver; that a cultural arts center be established which would be attended by students from various schools on a half-day basis once or twice a week; that educational centers be created; and that a superior school program be initiated for Smiley and Baker junior high schools.

busing three thousand black students from inner city elementary and junior high schools to the predominately white schools in Southwest Denver.[49] The resolutions' impact on the Denver community was electric.

A school Board election in May of 1969 became the focal point of the busing issue. An incumbent, Edward Benton, and a newcomer, Monte Pascoe, both backers of the plan, were defeated 2.5 to one by Frank Southworth and James Perrill, who opposed the resolutions. Over 108,000 Denverites, more than half the registered voters in the city, voted. Nearly every organization in Denver took a position on the issue.[50] For the next decade the issue of busing defined Denver's politics.

On June 9, 1969, Resolutions 1520, 1524, and 1531 were rescinded and superseded by Resolution 1533, which sought to achieve desegregation on a voluntary basis.[51] The Board's justification was a response to the community sentiment expressed in the school board election. Ten days later, eight parents of Denver public school students sought to enjoin the implementation of Resolution 1533 and the rescission of Resolutions 1520, 1524 and 1531. Eighteen years later, *Keyes v. School District No. 1* remains an active lawsuit.

II. A LEGAL CHRONOLOGY
THE LIABILITY PHASE TO THE FINAL ORDER
(1969-1974)

The complaint stated two claims for relief: first, that the rescission of the resolutions be temporarily and permanently enjoined and second, a declaratory judgment that the rescission of the resolutions by the school board constituted a violation of the Equal Protection clause.[52] The bulk of the allegations contained in the first claim were

49. *Keyes*, 313 F. Supp. at 66. The Report was titled 'Planning Quality Education—A Proposal for Integrating the Denver Public Schools'.

50. COLORADO, *supra* note 2, at 293.

51. *Id.* Interview with Edgar Benton, former member Denver Board of Education, in Denver (Sept. 10, 1984) [hereinafter Benton interview]. Pascoe Interview, *supra* note 34.

52. *Keyes*, 313 F. Supp. at 66. Resolution 1533 provided for a voluntary exchange program at Hallett Elementary School on a reciprocal basis, i.e., a volunteering pupil from Hallett could transfer to another school *if* a pupil from that school would volunteer to attend Hallett. The Resolution also called for the transfer of 120 Stedman students, on a voluntary basis, to other elementary schools where space was available.

tried fully at the hearing on the preliminary injunction, the allegations of the second claim at a trial on the merits.

In hearing the claim for an injunction, district court Judge William E. Doyle found that during the ten-year period preceding the passage of resolutions 1520, 1524, and 1531, the Denver School Board had carried out a policy of racial segregation. The judge further stated that the rescission of the school integration plan would perpetuate school segregation and chill the plaintiff's rights of equal educational opportunity.[53] The court issued a preliminary injunction. The school board appealed successfully to the Tenth Circuit Court of Appeals, which vacated the preliminary injunction.[54]

After a trial on the merits, the District Court found that the Board had acted in violation of the plaintiffs' Fourteenth Amendment rights. The Board's segregative acts were taken with knowledge of their effect on attempts to desegregate the school system.[55] The court concluded that the only feasible and constitutionally acceptable program would be a system of desegregation that provided compensatory

53. The temporary injunction sought to maintain the status quo and to enjoin the school board from modifying the purchase orders for the school buses, from destroying documents relating to or pertaining to the implementation of the resolutions, and from taking any action which would make it impossible or more difficult to proceed with the implementation of the resolutions, and from taking any action which would make it impossible or more difficult to proceed with the implementation of the resolutions. The second claim for relief addressed itself to general injunctive relief and for declaratory judgments as to the unconstitutional acts of the school board. It demanded affirmative equitable relief to force the board to deal with the consequences of school segregation in those portions of Denver school system in the core city areas not merely in the Park Hill Schools. *Keyes*, 303 F. Supp. 279 (D. Colo. 1969). *See* PEARSON, *supra* note 1, at 190.

54. *Keyes*, 303 F. Supp. 279.

55. The Circuit Court remanded to the District Court questioning the specificity of the injunctive order and directed the District Court to consider the application of title IV, § 407(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000(c)-6(a). The Court of appeals published no decision. On remand Judge Doyle held that where the statute granting the cause of action for deprivation of civil rights was 42 U.S.C. § 1983 rather than the Civil Rights Act of 1964, the proscription in the latter statute against ordering busing to achieve racial balance was not applicable. *Keyes*, 303 F. Supp. 289 (D. Colo. 1969). This too was appealed to the tenth circuit which on August 14th vacated the preliminary injunction pending the decision of an appeal taken by the school board on the preliminary injunction. The Court of Appeals stayed the preliminary injunction because of insufficient time before the schools opened to examine the record to determine whether the District Court had correctly held that there was de jure segregation in the schools. Plaintiffs appealed immediately to the United States Supreme Court, and Mr. Justice Brennan sitting as an individual justice vacated the order of the Court of Appeals and directed the reinstatement of the District Court's order. *Keyes*, 396 U.S. 1215 (1969). The reasoning was procedural: an order granting or denying a preliminary injunction will not be disturbed by a reviewing court unless it appears the action taken was an abuse of discretion. The Court of Appeals had not suggested that.

education in an integrated environment. The court delayed the implementation of such a plan for one year and adopted an interim plan which applied to fifteen core-city schools.[56]

The court of appeals affirmed the trial court's conclusion that the Board's actions in one neighborhood, the Park Hill section of Denver, during the 1960s, constituted *de jure* segregation. The Court also affirmed the trial court's conclusions that plaintiffs had failed to make a *prima facie* showing concerning the core city schools, but reversed the district court conclusion that maintenance of *de facto* segregated schools in the core of the city violated the fourteenth amendment.[57]

On appeal, the United States Supreme Court reversed the circuit court's opinion.[58] *Keyes* was the first non-southern desegregation case to be decided by the Supreme Court. The majority found that where school authorities had "carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it [was] only common sense to conclude that there exist[ed] a predicate for a finding of the existence of a dual school system."[59] The purposeful concentration of minority students in certain schools had the reciprocal effect of keeping other schools Anglo.[60]

The High Court established the presumption that the Board's segregative acts in a substantial portion of the school district rendered the entire district a dual system. It directed the district court, on remand, to offer the Board the opportunity to prove that the Park Hill area was a separate, identifiable, and unrelated section of the district. In the event the Board should fail in its proffer, the district court was to determine whether the Board's conduct, in deliberately segregating Park Hill schools, made the entire school system a dual school system.[61] If so determined, the Board had the affirmative duty to desegregate the entire system root and branch.

Judge Doyle, on remand, concluded that the segregative acts of the Board in Park Hill did constitute in the entire district, a dual

56. *Keyes*, 313 F. Supp. 61 (D. Colo. 1979).
57. *Keyes*, 313 F. Supp. 90 (D. Colo. 1970).
58. *Keyes*, 445 F.2d 990 (10th Cir. 1971).
59. *Keyes*, 413 U.S. 189 (1973).
60. *Id.* at 201.
61. *Id.* at 208.

school system; the Board's intentional segregation in Park Hill had substantially affected schools outside the area.[62] On December 13, 1973 the court ordered the parties to submit plans for desegregation of the entire school district. After finding unacceptable the desegregation plans submitted by both the plaintiffs and the defendants, the court appointed its own expert, Dr. John N. Finger, and thereafter approved his desegregation plan, known as the Finger Plan.[63] The final decree, adopting a desegregation plan which included part-time busing and imposed a permanent injunction, was entered in an unpublished opinion in April 17, 1974.

THE INITIAL REMEDY (1974-1976)

The plan adopted by the district court desegregated Denver's schools by rezoning attendance areas across all grade levels, ordering busing, and reassigning elementary school minority students. Approximately 37 schools were to be organized in pairs or clusters for purposes of part-time reassignment of students on a classroom basis. This required transportation of students from their home schools to a receiving school for half days plus the lunch period. They would then be returned to their neighborhood school. A child would be in a "receiving" class some days and in a sending class on others.[64]

Junior and Senior high schools were desegregated by new attendance zones and satellites. The Court set a 40 percent minimum percentage and a 70 percent maximum percentage of anglo students in every elementary school.[65] In the secondary schools the minimum was set at 50 to 60 percent anglos. Deviations were permitted from those percentages for particular areas and schools.

Eight elementary schools were to have anglo enrollments below 40 percent. The departure from the court's guidelines was justified for five of these schools on grounds of the school's inaccessibility and the desire to continue or to institute bilingual-bicultural programs at predominately Hispanic schools.[66] These five elementary schools were to

62. *Id.* at 213.

63. *Keyes*, 368 F. Supp. 207 (D. Colo. 1973).

64. *Keyes*, 380 F. Supp. 673 (D. Colo. 1974). The plaintiffs' plan proposed excessive busing and was too complicated. The defendants' plan did not meet constitutional requirements.

65. *Keyes*, 521 F.2d 465, 475 (10th Cir. 1975).

66. *Id.* at 476.

have been left with minority enrollments ranging between 77 percent and 88 percent.[67]

On appeal, the tenth circuit affirmed most of the desegregation plan, but rejected the part-time pairing plan and ordered implementation of a full time desegregated school environment.[68] It reversed an order to consolidate two of the high schools.[69] The circuit court also faulted the plan for leaving five elementary schools as segregated Hispanic schools.[70]

The court found that the five schools were substantially disproportionate in their racial composition[71] and therefore, under *Swann v. Charlotte-Mecklenburg Board of Educ.*,[72] a presumption existed against the school district's compliance with its constitutional responsibility. It held that continued segregation at these schools could be justified only on the basis that practical or other legitimate considerations rendered desegregation unwise, or on the basis of proof that the

67. *Keyes*, 380 F. Supp. 673, 692, 717 (D. Colo. 1974).

68. *Keyes*, 521 F.2d 465, 479 n.15 (10th Cir. 1975).

69. One of the great mistakes in the remedy stage was the adoption of the part-time pairing plan suggested by Denver Post education writer art Branscombe. The theory of the plan was to offer the dual advantages of neighborhood schools and an integrated educational experience. The Finger plan assumed that part-time pairing would be easily convertible to full time pairing.

Part-time pairing offered continuous neighborhood contact with school officials. The child would spend part of the school day at the neighborhood school learning basic subjects such as reading and mathematics. Then, he would be bused to another school and would return to the neighborhood school for after school activities. Students spent too much of the day on buses, however. Parents objected vociferously to this. Part-time pairing was the greatest mistake of the remedy stage. Because it offered eighteen of the most severely segregated schools only part-time desegregation and deprived minority students of an education equal to that provided in other schools in the district, it was rejected by the appeals court, which ordered "implementation of a full-time desegregation program within a reasonable time and in accord with changing conditions." *Keyes*, 521 F.2d at 479.

70. In order to integrate the senior high schools, the District Court, in addition to altering attendance zones, had ordered a consolidation of East and Manual High Schools into a campus complex. *Keyes*, 380 F. Supp. 673, 691 (d. Colo. 1974). The consolidation was reversed because in acting on its own notions of good educational policy, the District Court exceeded it remedial authority. The Court could alter the school system only to relieve a constitutional violation or to remove obstacles to such relief. The Circuit Court also affirmed the District Court's requirement of desegregation of faculty and staff and ordered the school district to assign its personnel so that, in each school, the ratio of minority teachers and staff to Anglo teachers could not be less than fifty percent of the ratio of minority to Anglo staff in the entire system. *Keyes*, 521 F. Supp. at 484.

71. Minority enrollments varied between seventy-seven and eighty-eight percent. The court remanded for a determination whether the continued segregation of schools could be justified on grounds other than the institution of bilingual programs. *Id.* at 480. bilingual education was not a substitute for desegregation.

72. *Id.* at 480.

racial composition of these schools was not the result of past discriminatory action on the part of the school board. In an action that did not completely please the hispano community, the circuit court ruled that bilingual education was not a substitute for desegregation and such instruction had to be subordinate to a plan of school desegregation.[73]

The issue of whether the five predominately hispanic schools could be justified was remanded to Judge Doyle.[74] The stipulated plan for desegregation agreed to by the parties after the remand, approved by Judge Doyle in an order entered on March 26, 1976, contained nothing related to issues of limited-English language proficiency (LEP). The five predominately hispanic elementary schools were now included in the overall desegregation plan.

The circuit court's opinion also resulted in an increase in the number of elementary school students bused.[75] According to Willis Hawley, later a court appointed expert:

> After full implementation of the desegregation plan in 1975 Denver achieved approximately eighty-five percent of possible district wide racial balance. In subsequent years, levels of racial balance increased. Prior to the implementation of the plan, eleven of Denver's 119 schools had enrollments that were more than ninety percent minority. Twenty-one percent of the district's minority-student population attended these schools. By 1976 Denver had eliminated all eleven schools with such a minority proportion of enrollment.[76]

An order dated March 26, 1976 approved the issuance of an agreed plan in response to the court of appeal's decision.[77] One criticism of the 1974 implementation concerned the frequent changes in school assignments. The Board had requested that no changes be made in student assignments for three years in the interests of continuity and

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73. 402 U.S. 1, 26 (1971).

74. *Keyes*, 521 F.2d at 480.

75. *Id.* Originally five schools with overwhelmingly hispanic populations were to be kept separate from the initial 1974 remedy. The circuit court disapproved.

76. The plan provided for the pairing of many of the elementary schools by establishing primary schools for grades kindergarten, 1-3 and intermediate schools covering kindergarten and grades 4-6. By 1976, the number of Anglo percentages was reduced to a range of thirty-four to sixty-four percent because the number of Anglo students had declined from 38,463 (54.1 percent) in the elementary schools in September 1973 to 35,307 (51.7 percent) in September 1974.

77. HAWLEY ET AL, STRATEGIES FOR EFFECTIVE DESEGREGATION, 36 (1983).

stability. The bilingual issues were left open, but the plaintiff intervenors and the board were in the midst of settlement discussions which did not come to fruition.

After the entry of the 1976 order, the case was assigned to a worthy successor to Judge Doyle, Judge Richard Matsch.[78] He had been appointed to the District Court bench by President Nixon. The son of German-Lutheran parents who came to Denver from Burlington, Iowa; Judge Matsch began his legal career with a Denver law firm, Holme Roberts & Owen. He worked in the offices of the U.S. Attorney and Denver City Attorney, and was a bankruptcy judge before nomination of the federal bench in March 1974 at the age of forty three. A private, austere, and closely disciplined person, Judge Matsch is a well respected jurist. His forcefulness in the Denver case surprised many.

FROM THE MORATORIUM ON CHANGING SCHOOL ASSIGNMENTS TO THE COURT SELECTED PLAN (1976-1979)

Upon entry of the 1976 order by Judge Doyle, the Board requested a moratorium on student reassignment. Judge Matsch honored the Board's request to avoid altering the student assignment plan for three years, from 1976 to 1979, except upon Board request for particular situations. It was hoped this moratorium would provide stability, continuity and stem the exodus of Anglo students from the system. Nonetheless, a decline in student population occurred.

To plan for declining pupil enrollment and consequent excess plant capacity,the Board of Education in 1977 appointed an advisory committee of citizens to study the utilization of school buildings and to recommend criteria for closures and consolidations. The advisory committee submitted a report, which did not contemplate action to make changes before September, 1981. The Board, which accepted the advisory committee's report in April, 1978, moved up the time to make changes to September, 1980. After the Community Education Council (CEC), a court-appointed monitoring group expressed concerns that imbalances in racial composition and crowded conditions had developed in some schools; court hearings were held in January,

78. *See supra* p. 15.

1979 to consider the status of those schools.[79]

The CEC had requested the hearing to obtain a status report from the School Board and the Denver Public Schools (DPS) administration on the comprehensive, city-wide plan for the schools which would be implemented after the three-year moratorium on altering student assignments expired.[80] At the hearing, the Board stated that it had directed the filing of a report by an Administration Task Force on school closings and school assignments in March, 1979. It set May 1, 1979 as the date for the filing of a comprehensive student assignment plan, and June 1, 1979 as the date for its Task Force to report on the status of compliance with orders requiring affirmative action in the hiring, assignment and in-service training of teachers, administrators and staff. A new plan, adopted in Resolution No. 2060, met opposition from the plaintiffs/intervenors and, accordingly, a further hearing was held on July 20, 1979 on the motion of the defendant School District No. 1 to implement those portions of Resolution No. 2060 dealing with school closings and pupil assignments for the 1979-80 school year.

The Board's proposals in Resolution 2060 were designed to increase the number of students who attended their neighborhood schools and to decrease busing. The burdens of the plan were not equally shared. Some children would be bused, while others would attend neighborhood schools. The board never considered upon whom the burdens would fall. After the CEC and plaintiffs objected to the plan of Resolution 2060, the Board never met in legislative session nor considered alternatives.[81] The administrative staff's reaction to the CEC was hostile, petulant and decisive.[82] Clearly, it took its cue from the Board. The staff developed several delaying proposals for further study. A decision had to be made. The Board left it to Judge Matsch to make the necessary changes in student assignments. Matsch later said that the Board's dereliction of duty enabled its mem-

79. *See* PEARSON, *supra* note 1. Judge Doyle, who had overseen the litigation since its commencement in 1969, was elevated to the Tenth Circuit, a deserving reward given the abuse he had received and the success he had achieved in implementing the remedy without violence.

80. This period is detailed in *Keyes*, 474 F. Supp. 1265 (D. Colo. 1979) and summarized in *Keyes*, 609 F. Supp. 1491, 1500-1501 (D. Colo. 1985).

81. *Keyes*, 474 F. Supp. at 1268.

82. There was no objection to closing four elementary schools which had become racially imbalanced. *Id.* at 1269.

bers to avoid criticism from the community, and permitted them to continue their politically popular protest against judicial intervention in local self-governance.[83] Matsch then ordered the student assignment changes.[84] The next time around, the court refused to make the assignments, forcing the Board to make the choices.[85]

FOUR SCHOOL BOARD MEMBERS IN SEARCH OF A NON-BUSING PLAN: FROM THE AD HOC PLAN TO TOTAL ACCESS TO THE CONSENSUS PLAN (1979-1982)

Another key area in which the school board procrastinated, after the implementation of the consent decree, was the development of a permanent unitary school district plan once the court had relinquished control.[86] From July 1979 until the spring of 1982, the Board split along philosophical and political lines, with the anti-busers holding a four to three majority.

The anti-busing coalition arose in May 1981 when Franklin Mullen, a businessman who spent approximately $100,000 on his anti-busing campaign, was elected to the school board.[87] He joined Robert Crider, who had opposed mandatory busing throughout his 12-year tenure on the school board, Naomi Bradford, a staunch anti-buser who also was re-elected in 1981 and who later became the Board's president, and William Schroeder. The liberal wring of the Board consisted of Kay Schomp, Rev. Marion Hammond and Omar Blair, all of whom supported busing.[88]

The July 30, 1979 memorandum, issued by Judge Matsch, ordered the Board to develop a plan for a permanent unitary school district. Matsch essentially said it was time to close out the ten-year-old

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83. *Id.* at 1272.

84. *Keyes*, 609 F. Supp. at 1501.

85. The court adopted the plaintiffs-intervenors' proposal for the reassignment of students from the closed Ellsworth Elementary School; made its own reassignment of students from the closed Emerson Elementary School; made assignments to the new McKinley-thatcher School; rejected the Board's proposed removal of Ashley mobile units; approved the reassignment of pupils from closed Elyria Elementary School; adjusted the attendance zone of Belmont School; adjusted the Fairview-Greenlee-Traylor grouping by pairing Fairview and Rosedale; and authorized the establishment of an Oakland-McGlone pair. There was no adjustment for Gilpin and Mitchell, which remained segregated schools. *Keyes*, 474 F. Supp. at 1272-1276.

86. *Infra* pp. 20-26.

87. *Keyes*, 474 F. Supp. 1265, 1271-72 (D. Colo. 1979). Interview with Gordon Greiner, lead counsel for plaintiffs, in Denver (Sept. 12, 1984) [hereinafter Greiner Interview].

88. Branscombe, *Denver Board Gets Anti-Busing Majority*, Denver Post, Dec. 1, 1981, at 1.

suit.[89] On March 15, 1982, nearly 32 months after the memorandum, Judge Matsch rejected the Total Access Plan (TAP), a proposal whose major tenets were open enrollments and magnet schools, not busing.[90] The Board had approved the plan by a four to three vote, over the objections of the three liberals, and after the Board had spent considerable time working out a completely different desegregation proposal that called for continued busing, although on a more limited basis.[91] Throughout this period, there was no consensus among the board members, only disagreement, and by May, 1982, the Board still had the lawsuit to resist.

THE AD HOC PLAN

In 1980, an Ad Hoc Committee was formed by Board resolution to formulate a plan acceptable to the court, a blue print for shepherding desegregation on its proper course. The committee, which was chaired by Kay Schomp, included representatives of the black and hispanic communities, as well as teachers, the League of Women Voters, and the Denver Parent-Teacher-Student Association. In addition to meeting regularly as a group, the committee held public hearings for additional input from the community.[92]

After a series of public hearings and much discussion, including the release of a draft report in December 1980, the committee released its final report on June 5, 1981. Among other programs, it called for maintaining 26 "walk-in" or neighborhood elementary schools, creating five new "walk-in" junior high schools, and eliminating 27 satellite attendance areas.[93] The plan also proposed establishing two magnet schools at the elementary school level.[94] In all, the plan proposed

89. Of the 1981 school board election, Matsch later wrote, "As it has been since the first orders in this case, the jingoism of 'forced busing' was very prevalent during the campaign." *Keyes*, 540 F. Supp. 399, 401 (D. Colo. 1982).

90. "The ultimate objective is to define and create a unitary system so that jurisdiction of the Court over Denver schools may be relinquished," Matsch wrote, adding, "It is important that the burden of busing be shared and that there be no disproportionate impact on a racial or ethnic balance." *Keyes*, 474 F. Supp. 1265, 1270 (D. Colo. 1979).

91. *Keyes*, 540 F. Supp. 399 (D. Colo. 1982).

92. Branscombe, *Denver's Plan for No Busing For Schools Sent to U.S. Judge*, Denver Post, Dec. 11, 1981, at 1A.

93. Telephone Interview with Kay Schomp, former member, Denver School Board (Nov. 8, 1985).

94. Branscombe, *Desegregation Plan Unveiled*, Denver Post, June 6, 1981, at 4B.

blanketing two-thirds of the city with walk-in schools.[95]

The Ad Hoc Committee's plan was resisted by the Community Education Council (CEC) as an attempt to return to segregation.[96] By October 11, 1981, after mulling over the Ad Hoc Committee's plan and making several changes, the Board adopted a plan under which 2,600 fewer children would ride the bus, and eight additional neighborhood schools would be created.[97] Board member Omar Blair objected to the plan, however, saying it would force a disproportionate number of black children to ride the bus. At the elementary school level, he contended, 640 out of 890 students bused from satellite areas would be black; 943 out of 1,310 at the junior high level, and 2,600 of 3,000 at the high school level.[98]

At that same meeting, William Schroeder presented his own plan, the key feature of which was to eliminate forced busing. He wanted students assigned to schools nearest their homes, unless they preferred a different school.[99]

Schroeder's proposal did not sit well with many Denver residents, particularly minorities, who saw the plan as an attempt to resegregate the schools.[100] At its next meeting, the Board, therefore, resolved to send two desegregation plans to the judge. One was Schroeder's, the other was a successor to the Ad Hoc Committee's plan.[101] This second plan called for restoration of up to 19 walk-in schools, all of them in neighborhoods considered residentially integrated and the continuation of busing, although to a lesser degree.

The submission of the two plans was an attempt by the bitterly-divided Board to shirk its elected responsibility to set DPS's policy. The judge refused to select either of the plans. After receiving the two proposals, he bluntly ordered the Board to submit one "definite

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95. *Id.*

96. *Keyes*, 609 F. Supp. 1491, 1502 (D. Colo. 1985). Branscombe, *Questions Arise in "Unitary" School Desegregation Plan*, Denver Post, June 14, 1981, at 1F.

97. Branscombe, *Monitors Critical of New DPS Plans*, Denver Post, June 24, 1981, at 31. Another CEC complaint focused on the proposed formation of two magnet schools, which they feared would drain students from other schools and cause racial balances to tip. *Id.*

98. Branscombe, *Bold School Plan Being Readied*, Denver Post, Oct. 12, 1981, at 1B.

99. Branscombe, *Flaw Seen in Plan Cutting Bus Riders*, Denver Post, Oct. 9, 1981, at 1B.

100. Schroeder's proposal marked a reversal of the course previously taken by the board. *Id.*

101. Branscombe, *School Board Proposal Termed Resegregation*, Denver Post, Oct. 21, 1981, at 1B.

plan."[102] Matsch did not want to assume a receivership position over the Denver schools as had occurred in Boston, nor did he want to give board members a way to wheedle out of their elected responsibilities. Throughout this case, the court pushed and urged the Board toward the goal of a unified system.

THE TOTAL ACCESS PLAN

Rebuffed by the court, on November 30, 1981, the Board voted four to two to formulate another plan by December 10th. The Board's anti-busing majority directed DPS staff to come up with a plan that would halt mandatory busing. Called "The Total Access Plan" (TAP), the plan's foundations were open enrollments and magnet schools, both of which, a majority of the Board felt, could create and sustain a unitary school system.[103] TAP was presented on Dec. 10, 1981, by then-superintendent Dr. Joseph Brzeinski.[104] The Board approved the plan four to three, the usual tally during that period, with the three liberals opposing it.[105]

In addition to allowing students to attend schools close to their homes, the Total Access Plan proposed creating 35 magnet schools throughout the city, many of them at the elementary school level. There would be no mandatory busing. At the elementary school level, TAP called for, among other programs, a fundamental school, a Montessori school, four education centers for the gifted, a foreign language center, an extended day care center and a center for "academic advancement through problem solving." There would also be two magnet schools at the middle school level, and every high school would have some type of magnet program. Manual High School, for instance, would have a "Classical Academy for Advanced Students," and Thomas Jefferson would have a pre-engineering program.[106] To-

102. Branscombe, *Schools Ordered to Choose One Integration Plan*, Denver Post, Nov. 13, 1981, at 1B.

103. *Id.*

104. Branscombe, *School Board Moves To End Forced Busing*, Denver Post, Dec. 1, 1981, at 1A.

105. Branscombe, *"Magnet" Desegregation Plan Ready*, Denver Post, Dec. 10, 1981, at 1B.

106. Branscombe, *Denver's Plan for No Busing For Schools Sent to U.S. Judge*, Denver Post, Dec. 11, 1981, at 1A. Said board member Reverend Marion Hammond, "I think this is educationally one of the worst things I've ever seen." Also at the meeting, Mullen accused Blair of not speaking for the majority of the black community: "They're embarrassed and tired of having Blair represent them."

tal Access also stipulated that students who wished to remain at their current schools would be given priority to do so.[107]

Also significant was the brief time the DPS staff had available—less than two weeks—to put the proposal together in order to meet Matsch's deadline for a unitary plan. By contrast, an alternative consensus plan, which the Board voted not to send to the judge, went through a much longer planning process and had the benefit of input from the public, not just from DPS staff.[108] Gordon Greiner, who has represented the plaintiffs since the case began in 1969, viewed the Total Access Plan as a political move, an attempt to use the court as a scapegoat.[109]

In January 1982, the school board, once again by a four to three vote, approved the hiring of a public relations company to publicize TAP and a law firm to defend the plan at an upcoming hearing before Judge Matsch. The superintendent said the public relations firm would be paid out of the $30,000 earmarked in the school district's annual budget for publicity.[110] TAP certainly raised some pertinent questions, among them, what the drawing power of magnet schools would be, particularly for schools in minority neighborhoods.[111]

By several accounts, Manual High School was regarded as one of the more successful desegregation stories in Denver, a school that make the transition relatively smoothly from a nearly all-black school to be integrated one.[112] Manual, once a nearly all-black high school in

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107. Branscombe, *"Magnet" Desegregation Plan Ready*, Denver Post, Dec. 10, 1981, at 1A.

108. *Id.*

109. Telephone Interview with Kay Schomp, former member Denver School Board (Nov. 8, 1985). Schomp stated TAP was "totally staff produced."

110. I think the board is a political animal. It likes the idea of trying to use the court as a scapegoat.

> By continuously and falsely holding out the idea to the electorate that what the judge is doing is wrong and unconstitutional, they obviously lost a very important opportunity for affirmative leadership and, in effect, again abdicated the responsibility and found it more politically profitable to take that point of view to be against busing.

Greiner Interview, *supra* note 87.

111. Branscombe, *Board Hires PR Firm for Anti-Busing Plan*, Denver Post, Jan. 22, 1982, at 1A.

112. Writing in a Denver Post "Point of View" Column, Sheila Towle and Michael W. Simmons asked:

> Would you as a parent send your child across town to a magnet school or magnet center when there is no direct route from your neighborhood to the school; when the education program for the magnet school or center exists only on paper and there are few trained teachers or principals for any of the programs, or when you have to make a career decision for your child by the end of the eighth grade?

North Denver, had an anglo enrollment of approximately 50 percent during the 1981-82 school year, up from five to six percent before the decree took effect in 1974.[113] Irving Moskowitz, who was directing the plan's development, said there was no assurance that white students, given other options, would continue attending Manual High School.[114]

The plan incited resistance very quickly. In early February 1982, approximately 20 teachers agreed to send letters to Judge Matsch expressing their objections to the proposal. In the words of Jerry McCracken, a social studies teacher at Manual, "As an education plan, it may be good, but as an integration plan it ain't."[115]

Enrollment figures began to surface that didn't bode well for the plan's future success with Judge Matsch. DPS staff projections indicated that under the plan, preponderately one-race schools, most of which had disappeared under the 1974 consent decree, would reappear in certain parts of the city. For instance, at Carson Elementary School, which was 40.4 percent anglo in 1982, the anglo enrollment would have jumped to 83 percent the following year under TAP. Meanwhile, at other schools, minority enrollments would soar.[116]

The same patterns reoccurred at the junior high and high school levels, according to the projections. Civil groups, including the Metropolitan Council of NAACP, the Greater Park Hill Community Schools Committee and the 4,000-member Denver Classroom Teacher Association, went on record opposing the plan.[117]

The four member majority of the school board held its ground,

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> Or would you wait a few years and send your child to a nearby school with the district's existing program? If you took a chance on magnets, would you choose one close to home or across town?

Towle and Simmons, *Total Access Plan: What Meaning*, Denver Post, Jan. 27, 1982, at 3B.

113. Colwell Interview, *supra* note 35.

114. Denver Public School Enrollment Figures. Keyes, 313 F. Supp. 61, 78. Copy of 1982-83 figures on file at the Institute of Judicial Administration.

115. Branscombe, *Plan's Primary Goal Is Education, School Desegregation Secondary*, Denver Post, Feb. 2, 1982, at 1B.

116. Branscombe, *Manual Teachers to Note Plan Opposition*, Denver Post, Feb. 12, 1982, at 1A.

117. DPS released these projections:

however, determined to rid DPS of mandatory busing.[118] Board member Robert Crider held that busing drove a lot of whites and blacks out of the Denver Public Schools. Crider advocated the use of magnet and neighborhood schools. Asked for its overall assessment of the court's intervention in the case, he said, "The courts haven't learned a thing. They kept ordering busing. Judges love it. They kept writing opinions. It gives them publicity. Lawyers get rich. Judges become legislators and administrators."[119]

Crider conceded that there were inequities in the school system prior to the *Keyes* case. The inner-city schools in the northeast section of Denver weren't replaced as rapidly as schools in other parts of the city, he said, and the younger teachers were often assigned to the minority schools. He called the remedy a "disaster," adding, the court, in using busing to remedy the situation was "playing a numbers game." "The court dictates with no responsibility. Local people should control the school district, the local people have lost control of the district."[120]

The hearing began on March 1, 1982. Testimony included state-

Elementary	(percentage Anglo) 1981-82	Total Access
Columbine	40.6	5.4
McMaen	43.2	83.4
Mitchell	22.5	4.5
Smith	32.1	2.7
Southmoore	45.2	94.9
Steck	45.5	94.5
Junior High Schools		
Baker	41.5	22.2
Hamilton	49.4	81.6
Hill	45.9	85.4
Mann	30.1	14.5
Merrill	34.0	83.9
High Schools		
Manual	50.1	5.6
G. Washington	40.7	75.1

Branscombe, *Plan Could Renew School RAcial LInes*, Denver Post, Feb. 16, 1982, at 1B.

118. Dillard, *NAACP Council Lambastes School Plan*, Denver Post, Feb. 16, 1982, at 1B; Branscombe, *Magnet School Concept Denounced*, Denver Post, Feb. 26, 1982, at 1B; Branscombe, *Groups Criticize Schools*, Denver Post, Feb. 12, 1982, at 1B.

119. One of them, Robert Crider, said in an interview that the remedy "took a growing school district and killed it." "Educationally, things haven't changed," he added. "The kids who were learning before still learn; the kids who weren't learning still aren't learning. Using transportation to remedy the situation is a mistake. People leave." Interview with Robert Crider, former member, Denver Public School Board, in Denver (september 13, 1984) [hereinafter, Crider interview].

120. *Id.*

ments from a variety of witnesses: On the first day, Irving Moskowitz testified that the Total Access Plan would be "a plan for the future . . . a breakthrough in public education." Moskowitz also said that under certain circumstances, children of the majority race in an 80 percent or more segregated school would be guaranteed the right to transfer. Attorney Gordon Greiner, who cross examined Moskowitz, asked: "A parent has absolute free choice to leave [a school], for any reason, including race? Correct?" Moskowitz agreed.[121] DPS Superintendent, Dr. Joseph Brzeinski, testified March 2, that the plan was not a desegregation plan.

The following day, March 3rd, Judge Matsch himself said the plan could cause resegregation. Matsch asked Dr. Mario Fantini, Dean of Education at the University of Massachusetts, and an expert witness in the case, if segregated housing patterns could lead to resegregation under TAP. Fantini replied affirmatively. Another witness, Dr. Robert Barr, Dean of the School of Education at Oregon State University, said there wouldn't be much desegregation under TAP initially, but that DPS would have to guard "against slipping back into segregation." A third witness, Dr. Willis Hawley of Vanderbilt University, told the court that "voluntary choice plans are not an effective strategy" in fighting desegregation.[122]

Despite some favorable testimony, Judge Matsch rejected the plan on March 15, saying it would fail to remove "the vestiges of racial discrimination in pupil assignment." The judge called the plan incomplete, saying, "I'm not certain that would happen, what central administration and staff would be doing." He added, the school board was

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121. *Id.* Board member William Schroeder was quoted as saying, "This is so much different from any of the plans we've ever tried before. I don't believe any child will be disadvantaged by the plan; every child will have an opportunity for a good education." Branscombe, *Pro: Parents To Have their Choice on Schools*, Denver Post, Feb. 24, 1982, at 10A.

122. Branscombe, *Schools Proposal Draws Praise as 'Plan for Future'*, Denver Post, Mar. 2, 1982, at 1B.

The following exchange occurred between Greiner and Brzeinski:

Greiner: "Would you admit that the Total Access Plan is not designed for desegregation?"

Brzeinski: "It's an education plan."

Greiner: "It doesn't even mention school desegregation, correct?"

Brzeinski: "That's correct."

Branscombe, *Plan Not Drawn to Desegregate, Brzeinski Agrees*, Denver Post, Mar. 3, 1982, at 1B.

asking him to accept the plan "as an act of faith."[123] Lastly, Judge Matsch noted "the abrupt switch to what a witness has described accurately as a radical plan." In this, the judge was referred to the Board's decision in late 19 to send him the Total Access Plan, instead of what had grown out of the *Ad Hoc* Committee's plan. "In summary, the total access plan was lacking in concern, commitment and capacity." He ordered the Board to come up with another plan in thirty days.[124]

THE CONSENSUS PLAN

After Judge Matsch's March 15th ruling, the Board began anew. On March 18th, it reviewed and approved the consensus plan, most of which grew out of the alternative plan the Board had approved the previous fall, before it submitted the Total Access Plan to the judge. After such an acrimonious period, President Crider made a plea to the Board for unanimity.[125] The vote was six to one, with Naomi Bradford casting the lone dissenting vote. On March 30th, the Board voted five to two to send the judge a substitute consensus plan. Only Bradford and Schroeder voted against the motion. Under the new proposal, the number of students bused for integration, approximately 14,500, would be reduced by about 2,600. Seventeen new walk-in schools, eleven at the elementary school level and six junior high schools, would be created. There would also be two magnet elementary schools, one stressing fundamentals and the other having an extended day program.

On May 12, 1982, nearly three years after he ordered the Board to come up with a suitable proposal for a unitary district in an effort to end the lawsuit, Judge Matsch approved the Consensus Plan. Matsch wasn't particularly happy with the plan. It did not end the suit and

123. Branscombe, *Judge Indicates Plan Could Lead to Resegregation*, Denver Post, Mar. 4, 1982, at 1A.

> Matsch summed up the testimony that favored the plan in an opinion three months later:
> On the positive side, the expert witnesses who testified at the hearing on the Total Access Plan generally approved of the educational philosophy involved in curriculum diversity and considered it to have considerable potential for enhancement of the quality of education for those students who might be able to participate.

Keyes, 540 F. Supp. 399, 402 (D. Colo. 1982).

124. Branscombe, *Jug Rejects Denver School Board Plan on Busing*, Denver Post, Mar. 16, 1982, at 1A.

125. *Keyes*, 540 F. Supp. at 402.

only applied to the 1982-83 school year. The judge said he would remain active in the case to make sure future reforms were enacted. He accepted the plan "with considerable reservations," adding, "I am not convinced the incumbent school board had shown a commitment to the creation of a unitary school system which will have adequate capacity for the delivery of educational services without racial advantages."[126]

The Board, split by philosophical and political differences, and with its majority opposed to busing as a desegregation remedy, was still a long way from settling the then 13-year old suit. Although Judge Matsch viewed the Consensus Plan, implemented in the fall of 1982, as an interim measure with a few minor changes, it has been in effect ever since. The school district has been unwilling to formulate a long-term plan for a unitary system that met the judge's approval. Moreover, Matsch wrote in his June 3, 1985 opinion, "the proposal was premised on a hope that there would be a discernible movement toward natural integration of these attendance zones by changes in housing patterns."[127]

Although Denver has become residentially more integrated over the past ten years, residential segregation persists, and has had an impact upon school enrollment. In 1982, the plaintiffs objected to the Consensus Plan on several grounds, one of which was that it would lead to racially identifiable schools. They were right. "Barrett and Harrington [elementary schools]," said Matsch, "have become racially identifiable schools, with their respective Anglo populations falling from 43.3 percent and 25.3 percent in 1981 to 18 and 15 percent in 1983. Mitchell fell from 22.5 percent to 12 percent Anglo."[128]

The plaintiffs claimed that racial imbalance stemmed from the Consensus Plan; the school board attributed it to white flight and said the existence of three racially identifiable schools did not constitute a dual system. The racial makeup of those three schools continues to be one of several obstacles to an out-of-court settlement.

Greiner, asked about the overall success of the Consensus Plan, and said he would like to see the racially-identifiable schools elimi-

126. Branscombe, *Denver Forced-Busing Plan Revived*, Denver Post, Mar. 19, 1982, at 1A.

127. *Keyes*, 540 F. Supp. at 403.

128. *Keyes*, 609 F. Supp. at 1507.

nated.[129] He blamed the Consensus Plan and wanted the district to formulate long-term guidelines, benchmarks that it could use to measure whether a system can be considered unitary in the future. Of course, the Consensus Plan, originally an interim, compromise measure that came at the end of a long, acrimonious period during which the Board tried to convince the judge to rely on magnet and neighborhood schools (not busing), did not have much chance of becoming a future blueprint. The Consensus Plan was a political compromise, patched together by a school board whose majority abhorred busing. It is not surprising, then, that it provided little in the way of guidelines toward establishment of a unitary system.

III. IMPLEMENTING THE REMEDY: HINDRANCES TO COURT WITHDRAWAL WHITE FLIGHT

In the mid 1970s the demographic changes evident throughout the city and its school system inevitably made the original desegregation plan obsolete. As with many other big-city school districts undergoing court-ordered busing, Denver experienced an exodus of anglo students. There are differences of opinion as to how much of it was actually spurred by the Court order and how much of it could be attributed, at least in part, to factors such as the declining birth rate among Anglos. For example, in 1974, the year court-ordered desegregation first took effect, there were 43,576 anglo students in the Denver public schools. By the fall of 1983, that number had dropped to 20,000. The most severe declines in the enrollment of Anglos, though, occurred during the first three years after Judge Doyle issued the busing order. In 1975, the enrollment of Anglos had dropped to 40,065, and in 1976 to 36,539. The fall of 1977 saw the sharpest decline, with anglo enrollment shrinking to 21,231—a loss of more than 15,000 students. From 1977 on, the number of anglo students has continued to decrease, albeit substantially more slowly.[130]

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129. *Id.*

130. Greiner Interview, *supra* note 87. Asked about what sort of guidelines he would like the school board to formulate, Greiner commented:

> It's not a Pasadena-type situation. We're not asking for annual adjustments of school enrollments. But what we would like to see is an affirmation that the idea that when they are presented with choices that they would make those choices in an integrated manner. Like the choice of where you locate a school and who goes to it. The choice of what school do you close and where do those kids get reassigned.

At the same time as anglo students were leaving the system, the black enrollment in the Denver public schools declined, though not as precipitously as the anglo student population. The black population, which stood at 14,831 in 1974, was down to 13,598 in 1983. In contrast to the decline in the number of anglo and black students, hispanic enrollment increased slightly, rising from 21,832 students in 1975 to 23,199 in 1983.[131] The largest population gain in DPS during the *Keyes* Case has been the Asian/Pacific Islander population, which increased from 780 in 1975 to 2,263 in 1983.[132] These last two groups have had a pronounced impact on the bilingual education issue.

Some argue that white flight would have occurred without court-ordered busing in Denver.[133] Dr. Charles Willie, a Harvard University professor of Education, advised the court that all major American cities have lost white residents, a trend that began in the early 1950s.[134] According to Dr. Gary Orfield, a court-appointed expert who studied the relationship between housing and school integration in Denver, court-ordered busing increases white flight, although only temporarily.

The number of whites leaving the city returned to "a normal demographic trend" in 1978, four years after the order took effect, he reported.[135] Orfield also said the Poundstone Amendment, which pre-

131. Letter from Sharon R. Hostetter to Lawrence Strauss (Aug. 2, 1984) (Colorado Dept. of Education, Planning and Evaluation Unit Ethnic Breakdown of Pupil Membership for Denver County, Fall 1974-Fall 1983).

132. *Id.*

133. *Id.* Declining Anglo enrollment was not confined to DPS, however. Jefferson County, which enjoyed robust growth during the time of the *Keyes* Case, saw its Anglo school population decrease, too. There, the number of Anglos enrolled in 1981 was 71,325, a decrease of 448 students in ten years. In addition, Anglo enrollment in four metro area counties—Adams, Arapahoe, Boulder and Jefferson—declined four percent from 1971 to 1981. At the same time, minority enrollment in those four counties increased by 77 percent during those years, from 16,479 to 29,632 in 1981. Colo. Dept. Educ., Ten-Year Student Ethnic Enrollment Trends: 1971-1981 in Four Major Suburban Counties and Denver (1982). Much of that increase occurred in Arapahoe County. Between 1971 and 1981, the black school-age population climbed from 708 to 3,444 and the Hispanic population jumped from 1,864 to 3,005. *Id.*

134. Robert Colwell, a high school principal in Denver during the 1960s and 1970s who now heads an association of private schools in the area, said the exodus to the suburbs was not confined to whites.

> The percentage of blacks who fled the inner city was almost, I think, as large as the percentage of whites. And the court order had nothing to do with that—or very little, I wouldn't say nothing. I"m sure there were people who left for that reason. But a lot of blacks went to Aurora, a lot of blacks went to North Glen and Littleton because integrated housing was available to them in the suburbs. Colwell Interview, *supra* note 35.

135. Weaver, *Busing Triggered White Flight? Truism Debunked by Experts*, Denver Post, Apr. 14, 1985, at 6.

vented the City and County of Denver from annexing any counties unless a majority of residents approved, was a key barrier that prevented Denver from having more white students in its schools. The Poundstone Amendment was passed in 1974, the year the remedy took effect. In recent years, various rehabilitated inner-city neighborhoods in Denver have begun to attract whites, some of them with school-age children.[136]

Despite these gains, however, a clear pattern has emerged: most of the minority students in the Denver Metropolitan area sit in DPS classrooms. According to a 1981 study of Denver housing by Orfield, seven out of every eight minority children in the Denver metro area attend DPS schools.[137] Since 1974, therefore, changing demographic patterns—most notably the decline in anglo students—has made integration within DPS more difficult, as there are fewer available students with whom to accomplish that goal.

BUSING AND POLITICS: THE POLITICALIZATION OF THE SCHOOL BOARD

In the course of the litigation, the Denver School Board, like many of its big-city counterparts, became an extremely political governing body, a plateau from which its members could launch political careers. This trend has had an adverse effect on the desegregation remedy.[138]

Since the late 1960s, few elected offices in Denver have offered so much visibility.[139] Busing continued to be an issue for the Board throughout the 1970s and in the 1980s, ebbing and flowing, sharpening in intensity and then softening—but always there. The issue remains, years after the court's initial busing order took effect, although much of the Board's anti-busing rhetoric has softened.[140] Still, some

136. *Id.*

137. Pascoe interview, *supra* note 34. See infra, pp. 45-46.

138. ORFIELD & FISCHER, "A POLICY ANALYSIS OF DENVER" in HOUSING AND SCHOOL INTEGRATION IN THREE METROPOLITAN AREAS: DENVER, COLUMBUS, AND PHOENIX 23 (1981). "The basic problem, however," Orfield wrote, "is that Denver contains only a small and declining fraction of the metropolitan area's Anglo students but retains a very large proportion of the minority children."

139. Interview with Art Branscombe, in Denver (Sept. 10, 1984). Branscombe was the Denver Post education writer who covered the lawsuit for the newspaper from its inception [hereinafter Branscombe interview].

140. "In Denver it [the school board] is the most visible position you can hold, more visible

Denver residents say that one of the remedy's major obstacles has been a recalcitrant school board, an elected group of officials under intense political pressure from the community at large, not to implement a less than popular, court ordered busing plan.[141]

The Board was given the politically difficult task of implementing an unpopular court order, and resisted—a phenomenon that has had a wide range of effects on the school system, as well as the court-ordered remedy. Not all Denver School Board members have opposed busing as a way to integrate public schools. Kay Schomp, Virginia Rockwell, Rev. Marion Hammond and Omar Blair, among others, have fought for busing, arguing it was the best alternative for the school system. For every pro-busing vote by Kay Schomp, however, there was a negative vote by Robert Crider. The conflict between the pro- and anti-busers often was played out in the local media. The lack of a consensus among the board members impeded the remedy's implementation.[142]

Until *Keyes*, those who served on the Board were members of the Denver establishment. Board membership was not a highly visible position politically. The 1969 school board election was a watershed. From then on, elections became ideological battlegrounds centered on busing. Increasingly sophisticated political tactics were used for a position that paid nothing. A brief look at the board elections from 1975, the year after the original remedy was implemented, until the election in May 1985, reveals the tenacious grip the busing issue has had on the Board's politics and how much the Board has evolved as a political animal—most notably when it came to getting elected and, more importantly, to staking out a political constituency.

In 1975, the *Keyes* case was the central concern of school board members. Naomi Bradford, who later became the board's president, ran a strong anti-busing campaign calling for the immediate elimination of busing as a means of integrating public schools. ". . . I will not

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than the City Council. The names of the school board members are better known. In our suburban districts this is not the case," noted Carol Ruckel, the mother of two DPS students who has closely followed the developments in the *Keyes* Case. Interview with Carol Ruckel, President, Denver-Parent-Teacher-Student Association, in Denver (Sept. 15, 1984) [hereinafter Ruckel interview].

141. Referring to the most recent school board election in Denver, held in May 1985, Sandy Berkowitz, a Denver parent said, "Busing really wasn't an issue this time, for the first time in a long time." Berkowitz Interview in Denver (July 13, 1985).

142. Branscombe Interview, *supra* note 139.

put forth efforts to see that busing works," she was quoted in the Denver Post shortly before the election.[143] Bernard Valdez, the Board's president at the time, said he wanted the governing body to forget about *Keyes*.[144] In addition, Denver resident Nolan Winsett, president of Citizens' Association of Neighborhood Schools, ran a campaign for the Board on a strong anti-busing theme.[145]

Two years later, Kay Schomp, one of the board's liberals and a firm supporter of busing, was re-elected to a second six-year term. Also re-elected that year was Robert Crider, the staunch anti-busing proponent who later was elected to the Denver City Council. Crider ran on a slate sponsored by the School Board Committee, an anti-busing group. Only 18 percent of the electorate voted in that election, however.[146] Despite the media attention the campaigns receive, light turnouts have been the rule in school board elections. Three years after the final decree, busing was still crucial to many voters and school board members, and Crider capitalized on it. In 1979, another anti-busing candidate, William Schroeder, was elected.[147]

Two years later, Franklin Mullen, spent approximately $100,000 on his successful anti-busing campaign, the first person to spend so much, using television to increase his name recognition.[148] Anti-busing proponent Naomi Bradford was also reelected that year, and later became president of the Board.[149] Still, with ever larger sums spent by candidates, school board elections had come to resemble mayoral, City Council and other political elections. In the 1980s, candidates dis-

143. Former Denver board member Kay Schomp offered an example of this phenomenon:

> Now, for the first three years that I was on the board of education, I was part of a board of education that was not committed to the court order. They did everything that they possibly could to disrupt it,—they dragged their feet wherever possible. They did not try to get sufficient funds, which they should have . . . . Instead, they kept appealing the case and did not approach the thing in a positive manner.

Schomp interview, *supra* note 27.

144. Branscombe, *School Board Candidates Offer Options for Racial Balance*, Denver Post, May 11, 1975, at 20.

145. Branscombe, *School Board Names Valdez, Blair To Top Positions*, Denver Post, May 29, 1975, at 1.

146. Branscombe, *School Board Candidates Offer cons for Racial Balance*, Denver Post, May 11, 1975, at 20.

147. Branscombe, *Crider, Schomp Retained on Boards* Hammond In, Denver Post, May 18, 1977, at 1.

148. *Id.*

149. Branscombe, *Denver School Board Gets Anti-Busing-Majority*, Denver Post, May 20, 1981, at 1.

cussed issues other than busing, and although the issue had not disappeared, it was more subtle.[150]

High visibility has made election to the school board a political stepping stone to higher office. Robert Crider and Ted Hackworth, whose name recognition originated with their school board membership, both became city councilmen. Naomi Bradford ran unsuccessfully for Congress on the Republican ticket. Former school board member Frank Southworth ran for Congress in 1970 while still on the Board.

The busing issue continued to appear in city politics as recently as 1983, when the city elected Frederico Pena, its first hispanic mayor. One of the mayoral candidates in 1983, Monte Pascoe, said his support of the court order was tacitly used against him during the campaign.[151]

The 1969 school board election proved helpful to the pro-busing forces in Denver, even though their candidates were soundly defeated. The people who had supported the pro-busing candidates in 1969 provided a nucleus of support for the remedy in 1974.[152]

The politicalization of the school board has meant that certain board candidates have run for office with the understanding they would oppose the court order—or not support it publicly. There is much political mileage to be gained by opposing busing, and over the years, there has been a stable constituency in Denver that supports that stance. As a result, the Board, in varying degrees, has been recalcitrant, and in some cases openly defiant toward court-ordered busing, creating definite obstacles to the decree's implementation.[153]

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150. Only 15.5 percent of the electorate voted in the 1981 race. *Id.*

151. They had become much more politically sophisticated than their predecessors—especially when one compared the school board elect ions to the pre-*Keyes* days. Paul Sandoval, for instance, was accustomed to electoral politics, having served as a state senator; Judy Morton used two campaign managers. Both were elected. Also elected was William Schumacher, a retired school principal. Branscombe, *Sandoval, Morton, Schumacher to Take School Board Spots*, Denver Post, May 18, 1983, at 13B.

152. Pascoe Interview, *supra* note 34.

153. "We lost two to one," said Monte Pascoe. "We got way more votes. We got twice as many votes as the person would normally get winning the school board election. What that did was identify for us 30,000 people, many of whom were willing to perform these other functions. And that's something other cities didn't have."

Pascoe was referring to the initial years of the busing order, during which things were somewhat fragile with several community groups strongly opposed to the plan. Pascoe Interview, *supra* note 34.

SPECIFIC PROBLEMS HINDERING IMPLEMENTATION OF THE DECREE: DPS BUREAUCRATIC INTERTIA

It is difficult to quantify what effect the Board's resistance had on the decree. Observers of the *Keyes* Case, both within and outside of the school system, contend the Board's reluctance to approach the remedy in a positive light filtered down in the school system in a variety of ways. One area was a lack of support by the DPS bureaucracy for Denver public school staff who attempted to integrate students.[154] Another example is how the DPS bureaucracy resisted input on implementation from a panel appointed by Judge Matsch after the consensus plan was adopted. The three-member panel—M. Beatriz Arias, Assistant Professor of Education, Stanford University; Willis Hawley, Dean of the George Peabody College for Teachers at Vanderbilt University; and Charles Willie, Professor of Education at Harvard[155]—was charged "[t]o meet with the Board of Education, any committee

154. Art Branscombe, who retired recently as education editor of The Denver Post, covered the *Keyes* case from its inception in 1969. One of the factors that has prevented 100-percent implementation of the decree, he says, has been the school board's resistance. "The board, as I say, has been anti-busing most of the time. They've never taken any positive approach to this thing and said we're doing this better. . . They [the board] didn't want to concede that anything good had come out of busing. Still don't. Particularly Bradford." Branscombe Interview, *supra* note 139.

Robert Colwell, principal of East High School in Denver from 1960 until 1974, concurred. "The political infighting in the board of education made it quite difficult to make this thing succeed. A lot of bickering, a lot of fighting, a lot of name calling." Colwell Interview, *supra* note 35.

Added Carol Ruckel, President of the Denver Parent-Teacher-Student Association:

> The board has never taken a public attitude that this is something positive, that is important for our city, that it's important for our kids to get along with other kids, and here is an opportunity for all of us to learn and grow together. . . There's never been that feeling from any of the board members or from any of the boards—the various boards we've had over the las;t ten years."

Ruckel Interview, *supra* note 34.

Colwell also said: "And so many members of the board during that period of time were elected to the board on a platform of no busing. It distracted attention from education—this continual warfare on the board." Colwell Interview, *supra* note 35.

155. Jim Ward, who was principal of Manual High School when it made the transition from an all-black school to an institution whose enrollment was fifty percent Anglo, recalled the early days of the decree. He said he received little cooperation from the administration. In an effort to ease racial tensions, Ward said, he tried to establish a summer job program for black and white students in 1974. They would work together on various projects around the school—fixing the sidewalks, for instance—and would form a corps of student leaders in the fall. Those students would serve as role models at Manual, many of whose students were not used to an integrated setting.

So I told the administrator down there (a city official) and he said it was a good idea, and I told him about the kids from southeast Denver needing the money. Well, when the superintendent found out about that, he just raised hell. Who the hell told you to go to the mayor or get

or administrative staff designed by the board, and with counsel for the parties herein, for the purpose of preparing appropriate guidelines for pupil assignment plans for subsequent years, including long-range plans." Even some pro-busing board members, such as Kay Schomp, objected to the Panel.[156] The DPS administrative staff treated the Community Education Council with contempt.[157]

The Board actively discouraged participation by DPS staff in assisting the Compliance Assistance Panel established by the court. Charles Willie, a member of the Panel, wrote a memorandum proposing techniques of recruiting and employing minority teachers and other employees and sent it to the Board. Willie and the two other members of the panel visited Denver to discuss the proposals, but were unable to speak with school administrators: "Our meeting was interrupted by a school board member [Naomi Bradford] who insisted on arguing about whether desegregation was a good idea."[158]

IN-SERVICE TRAINING

In the opinion of former board member Kay Schomp, a divided school board, especially during the volatile mid-1970s when the busing order took effect, impeded the school district's ability to train teachers to work in an integrated setting.[159] James Daniels, formerly a principal and now director of long-range planning for DPS, concurred, say-

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$10,000? And I said, well, hell, if you don't get the money. . . Who told you to go? And I said it's my responsibility to get the damn thing ready for the fall.

Interview with Jim Ward, former principal Manual High School, in Denver (September 11, 1984) [hereinafter Ward interview].

156. Toohey, *Desegregation Panel Chosen to Aid Board*, Denver Post, Dec. 17, 1982, at 1B.

157. The most recent monitoring group—who made the recommendation that we try to arrange the thing so that there would be a tri-ethnic situation in every school (that is, each school would reflect the district wide ethnicity, with blacks, Hispanics, Anglos and other groups all represented proportionately in each building). My God. Sometimes you wonder [referring to the daunting administrative task of coordinating such a proposal].

I like those people. I've respected a lot of them. . . I mean, there is a limit.

Schomp Interview, *supra* note 27.

158. Gordon Greiner described the resistance to the panel:

Two years ago, he [Judge Matsch] appointed this Compliance Assistance Panel. And he did that to help the district answer his concerns in eighteen different areas. You have these people that were appointed to the panel, were experts, that had a lot of good ideas and basically just got stonewalled.

Greiner Interview, *supra* note 87.

159. Branscombe, *Denver Schools Not Desegregated, Court's Expert* Says, Denver Post, May 10, 1984, at 7A.

ing he saw resistance to teacher training programs.[160]

The lack of in-service training was not the only barrier impeding implementation of the court order. Many teachers and administrators lacked a commitment to desegregation or to making the plan succeed. An administrator's passive or negative attitude to the plan would be easily conveyed to teachers and subordinate staff.[161] Also, many teachers had no experience with members of other cultural and racial groups, or social classes, and thus had little empathy for the strains to which the children were subjected.[162] Former board member Bernard Valdez offered a different view of the teaching situation: "We should have bused the teachers."[163]

While a series of interviews conducted by the authors reveals an overall feeling that busing has succeeded in reducing hostility among races and engendering a more equal distribution of teachers, facilities

160. Schomp Interview, *supra* note 27. She added: "There was never a sufficient time given to make it possible for the staff overall to really know how to handle the different kinds of children they were being exposed to at that time."

161. "That should be something you do automatically. If there's a good positive environment in schools, kids will learn." interview with James Daniels, Director of Long Range Planning, Denver Public Schools, in Denver (Sept. 11, 1984) [hereinafter Daniels Interview].

162. Mrs. Lawrence Lewis, a member of the Mile High NAACP, concluded that a lack of in-service training was not the only implementation problem at work:

> [School staff were] not prepared in terms of personal commitment or personal feelings. There were enough people who wanted the court order to come about, but the implementation of it had to be done by a lot of people who did ont have a commitment to it. And I think that was, you know, where the breakdown came. There was just not a real commitment to making the desegregation come about and succeed.
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> I think if an administrator did not strongly support the portion of desegregation, a lackadaisical attitude was sufficient for a faculty with one or two races to prevent anything from really getting done in that school. If didn't take many of them, it just took someone who took the leadership who would direct others in the school and it wasn't always an up front kind of direction. It was just a dragging. Just nobody would do anything. And so nothing got done. And I think that's where the breakdown really came. The board, for several years, was pro-desegregation, and a lot of in-services were given, and there was a lot of resistance to them. So if in-services had been what was needed, I think they were given to the degree that if the attitude had been what it should have been, it could have been achieved.

Interview with Mrs. Lawrence Lewis, member Mile High NAACP, in Denver (Sept. 15, 1984).

163. Ann Casey, a high school principal, said many teachers were unprepared for integrated classes in 1974:

> Well, many teachers were in elementary schools—well in all schools K through 12—had not ever had to deal with any ethnic group other than their own, and in this case I'm talking about the Anglo female teacher . . . and many of these teachers had few or no skills for coping with this kind of a cultural adjustment that these children were being forced to make.

Interview with Ann Casey, High School Principal, in Denver (Sept. 12, 1984) [hereinafter Casey interview].

and materials throughout the system, it is clear that trouble spots remain. One hundred percent implementation, perhaps an impossible goal, still faces institutional hurdles, not the least of which has been the school board's less-than-enthusiastic reception to busing.

RACIAL IMBALANCE IN STUDENT SUSPENSIONS

Racially disproportionate discipline has been an ongoing problem. According to Gordon Greiner, "Discipline is an issue that's hard to cope with, because you have minorities receiving a range from no discipline to lots of discipline. Neither extreme range is good."[164] In the fall semester of 1980, for example, 86 percent of the elementary students suspended were black or hispanic. The minority enrollment at that grade level was 57.6 percent.[165] In 1982, 39 percent of the students suspended were black, whereas whites, who outnumbered blacks, accounted for 25 percent of the suspensions.[166]

In 1981, seven years after the remedy took effect, Harvey Swan, chairman of the five-member Community Education Council, blamed the high minority suspension rate on the failure of in-service teacher training programs.[167] PTSA head Carol Ruckel contended that the disproportionate number of minority disciplinary statistics stemmed from cultural differences between students and teachers. "When you're dealing with cultural differences—and we try to apply the same

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164. Valdez interview, *supra* note 22. Asked if he thought the suit had resulted in a more equitable distribution of quality teachers throughout the system, Valdez responded:

> You see, initially, using seniority as a right to get transferred, the best teachers moved to the schools where Anglo children were moved to. The worst teachers remained in the ghetto schools. . . So as a consequence there was no question in my mind that education was inferior in the lower socio-economic schools. Then when children were moved all over—for the first time to mix, to see some teachers who really were interested in education—but I think as the years went on, the transfers began to . . . result in the same inequalities.

Id.

165. Greiner interview, *supra* note 87.

166. Branscombe, *Minority-Student Suspension Rate in Denver School System Criticized*, Denver Post, Dec. 16, 1981, at 16A.

167. DENVER PUBLIC SCHOOLS, ELEMENTARY AND SECONDARY SCHOOLS CIVIL RIGHTS SURVEY 159 (1982). James Esquibel, a DPS elementary school teacher, has conducted a considerable amount of research on minority suspensions. "In theory," he wrote in a study he prepared, "suspension is a risk that all students face on an equal basis; in practice I believe that suspension disproportionately impacts upon ethnic minority students. If my school is any indication of other elementary schools in DPS, then minority students are more likely to be suspended simply due to disproportionate numbers of minorities being referred to the office." ESQUIBEL, SUSPENSIONS IN DENVER ELEMENTARY SCHOOLS—3 YEAR STUDY 1976-79 3 (1980).

behavioral standard to them in school, which basically is an anglo standard, you're going to have—it is inevitable—that you're going to have more minority suspensions."[168]

In 1986, a study of DPS records indicated that 74 percent of the students suspended in the Spring of 1985 were black or hispanic, though the groups made up only 55 percent of the student population. Anglos, who represented 39 percent of the student population, accounted for only 24 percent of the students suspended. All but two of 19 students expelled during the January to June 1985 period were black or hispanic.[169]

The Denver results corroborate national findings. The district claimed that pupils were suspended because of an infraction of the rules rather than ethnicity.[170] However, in April 1987, as part of the guidelines that redefine integration for the Denver Public Schools, the

168. Branscombe, *Minority-Student Suspension Rate in Denver School System Criticized* Denver Post, Dec. 16, 1981, at 16A. "All that in-service training didn't do anything," Swann said. "It was a sham." James Ward blamed the teachers, at least in part, for the high rate of minority disciplinary problems. "there are mean kids all around," he said. "Mean people. I think of the problems teachers have, they create for themselves." Ward Interview, *supra* note 155.

169. Ruckel Interview, *supra* note 34. Former school board member Kay Schomp concedes the disproportionate number of minority suspensions is a moor worry for DPS. "I think it comes down to sufficient personnel sufficiently trained who will follow up on the cases or the reasons for these suspensions. At the secondary level, again I think there should be a place, an in-school suspension system that would not put a kid out on the street, or back in his home, where there's probably nobody there." Schomp interview, *supra* note 27.

170. Bingham, *Black, Hispanic students lead suspensions*, Denver Post, Mar. 6, 1986, at 1A. According to the Denver Post the suspension and expulsion figures were:

MIDDLE SCHOOLS

1,071 Total Suspensions, 12 Expulsions

Group	% of student population	# of students suspended	% of total	Expulsions
Anglo	35.4%	223	21 %	2
Black	24.8%	351	23.8 %	2
Hispanic	35.2%	469	43.8 %	8
American Indian	1.0%	17	.02%	0
Asian	3.5%	11	1%	0

HIGH SCHOOLS

972 Total Suspensions, 7 Expulsions

Group	% of student population	# of students suspended	% of total	Expulsions
Anglo	42.3%	252	26 %	0
Black	24.0%	387	39.8 %	2
Hispanic	28.9%	316	32.5 %	5
American Indian	0.7%	10	.01%	0
Asian	3.6%	7	0.7 %	0

Board will monitor suspensions and expulsions to "ensure that discipline is administered without racial discrimination or bias."[171] The issue may be more complex than just racially suspect numbers. There have been complaints that a disproportionate number of minority administrators have been placed into disciplinary positions as opposed to decision-making places.[172]

"HARDSHIP" TRANSFERS

"Hardship transfer" abuses have continued to be a problem. In his June 3, 1985 decision, Judge Matsch pointed at the abuses in the hardship transfer program as an indicator that Denver did not have a unitary system.[173] Such abuses have occurred because of the benign attitude, if not active connivance of the board.

The lenient allowance of "hardship transfers" for parents who did not want their children sent to a particular school encouraged widespread evasion of the desegregation plan. Ruckel contends that the Board's anemic approach to implementing the remedy led to abuse of the hardship transfer procedure. Asked how one goes about getting a hardship transfer, she said: "I register my kid at the school I want and use a fake address. Or I use a friend's address or claim an aunt's address. That's done a great deal, and people are very open about it, the fact that they've done it. There's not monitoring [of hardship transfers] from downtown."[174]

As a result of the June 1985 decision, the Board tightened its policy for granting transfers initiated by parents for work-related reasons. In February 1986, the Board approved a majority-minority transfer plan that allows students to voluntarily transfer only if the transfer improves integration. A student may transfer out of any school where his/her ethnic or racial group is more than fifty percent of the enrollment to a school where his ethnic or racial group is less than fifty percent.[175]

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171. *Id.*

172. Bingham, *Schools set rules to curb racism*, Denver Post, Apr. 8, 1987 at B1, col. 5.

173. *Id.*

174. *Keyes*, 609 F. Supp. 1491, 1512-14 (D. Colo. 1985).

175. Ruckel Interview, *supra* note 34.

FACULTY INTEGRATION

Integration of faculty throughout the school system has been an ongoing problem. In a brief filed in early 1985, in opposition to the Board's motion to end the lawsuit, the Congress of Hispanic Educators summarized many of their concerns: predominantly one-race classrooms, the shortage throughout the school system of minority teachers, the uneven racial mix of teachers throughout the system, and the drop in the hiring rate for hispanic teachers, even in years when the overall hiring rate increased. "The school district has a duty to eliminate not only segregated schools, but also segregated classes within the schools."[176]

Further, the brief claimed the program for the Gifted and Talented was "staffed by a teaching force that is more than 80 percent white and serves a student population more than 67 percent white." "The exclusion of minority students from the gifted and talented program serves as sufficient grounds for concluding the practice of racial and ethnic isolation continue."[177]

The low percentage of minority teachers continues to be a concern. For instance, a November 28, 1984 *Denver Post* story reported that: "The percentage of black and Hispanic teachers in the Denver public schools continues to fall short of goals set by the district ten years ago when court-ordered busing began."[178] The goals DPS set for itself in 1974—16 percent black teaching staff and 14 percent Hispanic—were designed to reflect the percentage of minority students in the district at the time. Since then, minority enrollment has increased, while many anglo students have left the system. In 1984, the teaching staff was 13.9 percent black and 9.7 percent hispanic, far below the student percentages. With few exceptions, the percentage of minority faculty members at individual schools fell well below the percentage of minority students in DPS.[179] One-third of the administrative staff in

176. Bingham, *Pupils can switch schools if move aids integration*, Denver Post, Feb. 21, 1986, at 1B. Keyes, 653 F. Supp. 1536, 1537 (D. Colo. 1987).

177. Bingham, *Brief Opposes Desegregation Plan Update*, Denver Post, February 20, 1985, at 2A.

178. *Id.*

179. Bingham, *DPS Short of Minority Hiring Goals*, Denver Post, November 23, 1984, at 1. Minority teachers are especially scarce at the middle- and senior-high school levels, according to DPS faculty statistics from the 1982-83 school year. Consider the minority teaching percentages at Denver's high schools, for instance.

1984 was minority.[180]

In the decision of June 1985, the court found that one of the reasons the DPS had not complied with the 1974 desegregation order was that minority teachers were not evenly distributed throughout the district.[181] The District applied a new formula which combined all ethnic minorities rather than separate counts for blacks and hispanics. The older formula meant that some schools with large hispanic populations had proportionally too many hispanic teachers.[182] The plaintiffs alleged in briefs, filed late in 1986, that overrepresentation of anglo teachers in formerly anglo schools continues and is attributable to the timing of annual reassignments which is done in the late spring rather than in the fall.[183] However, in the Fall of 1986, five weeks into the school year, fourteen teachers in eleven Denver schools were reassigned because DPS made an error in calculation and was uncertain how the formula applied to the affected schools which had hispanic faculty teaching in the bilingual program.[184]

School	% Anglo Teachers	% Hispanic Teachers	% Black Teachers
West	87.39	7.21	4.50
Kennedy	93.02	1.16	5.81
Lincoln	87.96	5.56	6.48
South	86.25	5.0	7.50
North	84.86	7.17	7.97
Jefferson	86.46	4.17	8.33
East	85.78	3.45	9.05
Washington	83.59	5.13	10.26
Manual	67.83	8.39	20.98
Montbello	64.88	8.68	25.62

Denver Public Schools, Faculty Data 12 (April 16, 1984).

180. However, the percentage of minority teachers in DPS is three times the average of the Denver metropolitan area, and the district has met or surpassed goals for hiring minorities in nearly all other job classifications, including administration. *Id.*

181. DPS claimed a shortage of minority teaching applicants, particularly in areas such as special-education and math-science. Despite a sixteen percent decline in the total number of DPS teachers from 1980 until 1984, the number of minority teachers increased slightly. *Id.*

182. *Keyes*, 609 F. Supp. 1491, 1508-12.

183. The formula is complex. Beginning with the 1985-86 school year to the extent practical, the percentage of minority teachers shall be within one-third of the applicable elementary, middle or high school percentages. *Keyes*, 653 F. Supp. at 1538. This means that the percentage of minorities teaching in elementary schools (grades one through six) at any one school must not deviate from the twenty-seven percent district wide minority percentage by more than a third. Thus a range of about eighteen percent to thirty-six percent of minority teachers would be appropriate. Allowances are made for schools with bilingual education purposes. Bingham, *14 DPS teachers shuffled to improve racial balances*, Denver Post, Sept. 247, 1986, at 1A.

184. *Keyes*, 653 F. Supp. at 1538-39.

ONE-RACE CLASSROOMS: RESEGREGATION?

Another barrier to successful implementation of the court order has been the continued existence of predominantly one-race classrooms, which is largely the result of academic grouping. Although statistics on this sensitive issue are difficult to find, predominantly one-race classrooms remain even after schools are integrated, according to reports from parents, attorneys and administrators.[185] According to DPS statistics, during 1985-86 anglos were four times more likely than blacks or hispanics to be admitted into accelerated or advanced placement classes which give intensive preparation for college. Forty percent of anglos were in such programs whereas only 11.5 percent of all blacks and 9.7 percent of hispanics were enrolled.[186] The "Challenge" programs for gifted and talented children tell the same story. At the elementary level, anglos comprised 37 percent of the student body, but 55 percent of the Challenge classes. Blacks and hispanos comprised 58 percent of the student population, but only 40 percent of the Challenge classes. In the high schools the disparity was greater; anglos comprised 41 percent of the high school population, but 70 percent of the Challenge classes. Blacks and hispanos, which made up 54 percent of the student population, comprised but 24 percent of the Challenge classes.[187] This is slightly better than the 1981-82 figures.[188]

The figures for special education programs are particularly distressing because the consequences are usually final; once a student is

185. Bingham, *14 DPS teachers shuffled to improve racial balances*, Denver Post, Sept. 27, 1986, at 1A. As usual the board rationalized its error by blaming the court. Judy MOrton, board president, said "I would say we made an error. We regret that it happened, but because it's a big issue in the court case, we have to make the changes." *Id.* The disruption of such a mid term change is not insubstantial. One wonders why DPS did not petition the court for a waiver.

186. Asked about this quandary, which seemingly creates two systems within DPS, one Anglo and the other minority, Kay Schomp responded:

> Does it fly in the face of the court order? Yes it does. And I think that one of the things that people expect to have happen is that as soon as the integration order goes in, they expect the immediate result to be total integration. And you know you have to have something like that in place from the time a child enters school, and even then it's a shaky proposition.

Schomp Interview, *supra* note 27.

187. Bingham, *Anglos dominate college prep*, Denver Post, March 15, 1986, at B1, col. 2.

placed in special education, he rarely returns to the regular track.[189] The results have been especially harmful to minorities. According to studies released in March, 1986 blacks were enrolled at a higher rate than other ethnic groups in programs for students with emotional and learning disabilities. Hispanos, on the other hand, were enrolled at a lower rate than their student population in special education programs for the emotionally disturbed. Blacks, who represented 22 percent of the total student population, comprised 39 percent of the students in the limited learning capacity (SLIC) program. They represented 30 percent of the children in a program for learning disabled and 36 percent in the program for emotionally disturbed or behavior disordered children.[190]

Because of the disproportionate number of minority children placed in these programs, the DPS has retained independent auditors to examine how children were identified and tested for the programs, whether their parents were fully informed, what impact the program has had upon the students, and why so few students ever return to the main track once they have been placed in a special ed program.[191]

In January, 1987, the outside auditors suggested that DPS should revaluate three thousand black and hispanic students to determine if they were improperly assigned to special ed programs. They also reported that the Denver Schools excessively relied on a culturally bi-

DENVER HIGH SCHOOLS (1985-86)

Group	No. of Students Total Students	% in in Advanced Classes	% in Advanced Classes
Anglo	6,714	2,691	40.0
Black	3,924	455	11.5
Hispanic	4,825	470	9.7
American Indian	129	11	8.5
Asian	684	216	31.5
Total	6,276	3,843	23.6

188. *Id.*

189. In 1982, whites, who accounted for thirty-nine percent of the district's enrollment, comprised sixty-eight percent of the Gifted/Talented program's enrollment. By contrast, blacks (twenty-three percent of DPS' students) only made up twelve percent of the gifted and talented program there; Hispanics, thirty-four percent district wide, were fifteen percent of the program. DENVER PUBLIC SCHOOLS, ELEMENTARY AND SECONDARY SCHOOLS CIVIL RIGHTS SURVEY 159 (1982).

190. Gallagher, *The Special Education Contract for Mildly Handicapped Children*, 38 J. EXCEPTIONAL CHILDREN 527, 529 (1972).

191. Bingham, *Black Profile in Special Ed High*, Denver Post, Mar. 20, 1986, at 1B

ased I.Q. test,[192] which resulted in minorities' significant overrepresentation in special education programs. Some students had been mislabelled and assigned to classes improperly. The auditors urged Denver school officials to cease use of the test. Thy also pointed out that children were not tested in their native languages and may have been assigned to programs because of language difficulties, and that once labelled and placed in special ed programs, the children never returned to main track because the school system lacked sufficient guidelines to determine when students were ready to return to the regular program.[193]

As a result of the report, DPS agreed to review five thousand student files to make certain that children were correctly placed. In addition, the board agreed to revise testing procedures, relying less on I.Q. tests, to retest students who needed or whose parents requested testing, to better inform and involve parents of children who are considered for the special programs, to attempt to keep children in the regular classroom as much as possible, and to set up a system of support so that students can leave the special education programs and return to regular instruction.[194]

Intra-school segregation may be a second or third generation problem,[195] yet does little to diminish the impact of segregation if the only time students of different races interact is on the playground or in

	STUDENTS IN PROGRAMS					
Program	Number of students	Anglo	Black	Hispanic	American Indian	Asian
Limited learning capacity (SLIC)	595	22.5%	39.2%	36.3%	1 %	1 %
Learning disabled (IPCD)	2,476	30.3%	30.3%	37.2%	1.4%	0.8%
Emotionally disturbed (TIC)	797	37.7%	36 %	24.6%	0.9%	0.8%
Total students in district:	58,614	37.7%	22.4%	35.1%	1.2%	3.6%

192. Bingham, *High rate of minority students in special ed to be investigated*, Denver Post, Nov. 4, 1986 at B2, col. 3.

193. The test used was the Wechsler Intelligence Scale for Children—Revised. Bingham, *IQ test laced with cultural bias, educators say*, Denver Post, Jan. 22, 1987, at 8A. IQ tests have been successfully judicially challenged. *See* Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) *modified* 793 F.2d 969 (9th Cir. 1984).

194. Bingham, *School auditors: Retest minorities in Special ed*, Denver Post, Jan. 22, 1987, at 1A.

195. Bingham, *Denver to review students' files*, Denver Post, Mar. 3, 1987 at B1, col. 1.

the lunchroom.[196] Unfortunately, there are some wrongs even of constitutional magnitude that courts cannot hope to remedy; school integration may be one. Intra-school segregation hampers the spirit, if not the effect, of the integration effort. Still more distinct from the implementation efforts is the relationship of housing patterns to school segregation.

HOUSING AND SCHOOL DESEGREGATION

The placement and racial composition of publicly subsidized housing has a direct effect on school desegregation. In the Denver metropolitan area, whites living in subsidized housing tend to be in the suburbs and blacks within the city limits. The housing projects themselves tend to be overwhelmingly of one race.

The fragile relationship between housing and school desegregation can be seen in the attempts to integrate the Barrett, Mitchell and Harrington elementary schools which have proven a road block to ending the lawsuit. In 1985-86, only ten more anglo children were needed to integrate Barrett and Harrington elementary schools to comply with court integration guidelines. Mitchell required 26 more anglo children.[197] However, segregated public housing was a key factor in contributing to continuing school segregation. For instance, at Mitchell, where 86 percent of the student body is minority, 55 percent of neighborhood housing is public, and 99 percent of public housing residents are minority.[198]

196. *See* D. KIRP AND M. YUDOF, EDUCATIONAL POLICY AND THE LAW 521-563 (2d ed. 1982).

197. James Ward, principal of Manual High School when the court order took effect, said the remedy has enhanced opportunities for minority students. While students of different races don't necessarily mix regularly with one another, students of all races have more to look forward to educationally now than they did in the days before the lawsuit. He recalled a tour he once gave to a person who was observing the Denver Schools. Upon visiting Manual's cafeteria, the observer commented that the black and white students sat separately, seemingly in two different schools. To which Ward replied, "What's wrong with that? Tell me what's wrong. We have to be responsible for certain elements of social relationships between kids, but we can't demand that. You have a right—and this is what a Democratic Society says—you have a right to go, if you want to sit at that table, you have a right to go sit at that table." Ward Interview, note 155.

198. Bingham, *Just 36 more Anglos would meet court's desegregation guidelines*, Denver Post, Nov. 27, 1985, at —. For a Denver school to be considered integrated court guidelines require the percentage of Anglos to be within fifteen percent of the percentage of Anglos in elementary schools in DPS in 1985-86. The percentage of Anglos was approximately thirty-seven percent. Thus, the percentage of Anglos in Denver elementary schools should have been between twenty-two and fifty-two percent.

Not all public housing is of the large project variety. Denver public housing programs include dispersed housing, scattered throughout an area, and rent subsidy programs. Even in these programs, 77 to 90 percent of the participants are minority.[199]

Even where a plan is developed to end racial imbalance such as the creation of a magnet school at Barrett, success in reducing the imbalance may be threatened by new public housing. The Key Point housing development, consisting of townhouses and apartments, is planned on a site next to the Barrett elementary school. If that development is not integrated, it will be that much more difficult to integrate the school without more busing.[200]

The housing picture may not be totally bleak. Urban demographic patterns change over time. In many cities, including Denver, younger professional people are moving into the city and renovating older housing stock. If they send their children to public schools, the Denver school system, which is a good system in comparison with other large cities, may be able to reverse the decrease in anglo enrollment. Until such time, however, the success of a permanently integrated school system is problematic.

IV. TOWARD A UNITARY SCHOOL SYSTEM (1983 TO THE PRESENT)

Four elusive and intractable questions have bedeviled the court and the parties to this lawsuit. The first two: How did the policy of containing blacks in northeast Denver affect the DPS as a whole, and what was required to remove these effects, flowed throughout the lawsuit.[201] In the late 1970s, as the demographics of the city changed and earlier racial balancing in the schools became more difficult to maintain, a third question arose: What must be done to protect against future resegregation and a return to a dual system of white and minority schools? Then, as the lawsuit reached its 15th year, the Board raised a fourth question: How and when would the court conclude the DPS was a unitary system?

199. Bingham, *Public housing a key factor in school segregation*, Denver Post, Jan. 19, 1986, at 3B.

200. *Id.*

201. Bingham, *Housing plans raise desegregation worry*, Denver Post, June 21, 1986, at C2, col. 5.

LEGAL CRITERIA FOR A UNITARY SYSTEM

In 1982 Judge Matsch defined a unitary system:

> A unitary school system is one in which all of the students have equal access to the opportunity for education, with the publicly provided educational resources distributed equitably, and with the expectation that all students can acquire a community defined level of knowledge and skills consistent with their individual efforts and abilities. It provides a chance to develop fully each individual's potentials, without being restricted by an identification with any racial or ethnic groups.[202]

In concluding whether a school system is unitary, district courts must keep in mind the uniqueness of each district, the efforts of public school officials, and whether the end of the lawsuit will lead to future resegregation and a return to a dual system.

The Supreme Court has not provided specific guidance as to when a racially unbalanced school system should be considered unitary, when a district court should return control to school authorities, or the manner in which a school desegregation case should be closed.[203] The court made clear in *Brown II*[204] that its function was to offer general guidance on broad principles of constitutional law, but it was the responsibility of district courts to apply those principles to the case at hand. Unfortunately, the cases at hand usually arrived at the Supreme Court. Instead of specific guidelines, the Court has offered a number of maxims, which like most generalities, are subject to exception and ad hoc construction. Of course, this is an old tradition of equity jurisprudence.[205]

In school desegregation cases, the Supreme Court has told us that the scope of the remedy is to be determined by the nature and scope of the constitutional violation, that the decree must be remedial in nature, and that courts must consider the interests of local authorities in managing their own affairs, so long as such management is consistent with the Constitution.[206] District courts must make "every effort to achieve the greatest possible degree of actual desegregation, taking

202. *Keyes*, 609 F. Supp. 1491, 1499 (D.C. Colo. 1985).

203. *Keyes*, 504 F. Supp. 399, 403-404 (D.C. Colo. 1982).

204. *Keyes*, 609 F. Supp. 1491, 1516.

205. Brown v. Board of Education, 349 U.S. 294 (1955).

206. *See* 4 POMEROY, EQUITY, JURISPRUDENCE § 363 (5th ed. 1941); POUND, "THE MAXIMS OF EQUITY," 34 HARV. L. REV. 809 (1921).

into account the practicables of the situation."[207] School authorities are clearly charged with the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[208] If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked and that equitable power is broad.[209] "[Not] every school in every community must always reflect the racial composition of the school system as a whole. . ."[210] "The adequacy of any desegregation plan is measured not by its intentions but by its effectiveness."[211] The Constitution does not compel the constant application of racial ratios for every school in the district.[212]

District courts have grappled with these aphorisms and attempted to concretize what boards should do and when courts can dismiss these proceedings. *Green v. County School Board* offered several criteria to measure whether a district had become a racially nondiscriminatory school system: the composition of the student body, faculty, staff, the school transportation system, the physical condition of the school system and extracurricular activities.[213]

Determining whether such a system has become unitary involves more than counting black, anglo and hispano faces in the classroom. In 1982 Judge Matsch, admitting the difficulty of the task and how inappropriate the adversary system was for such evaluation, appointed a panel of experts to assist in such judgments.[214]

A CHANGE IN STRATEGY

In December, 1983, the school board changed its strategy. Instead of delaying and then grudgingly complying with the court's orders, the Board voted unanimously to seek a court declaration that the school system was unitary and desegregated, and that it be released from court control. The origins of the Board's action, and its surprising unanimity, lay in litigation weariness—the suit was nearly fifteen

207. Milliken v. Bradley, 433 U.S. 267, 280-81 (1977).
208. Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33, 37 (1971).
209. Green v. County School Board, 391 U.S. 430, 437-38 (1968).
210. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).
211. *Id.* at 24.
212. Dayton Board of Education v. Brinkman, 443 U.S. 526, 539 (1979).
213. Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).
214. Green v. County School Board, 391 U.S. 430, 435-37 (1968).

years old—and in a belief that the times, or at least the legal context of desegregation remedies, had changed, Board President Bradford stated that the motion could be "a common ground for the Board."[215] It reflected a "war weariness" by the Board and the realization that a series of interim busing measures had done little to decrease segregation in the schools, or to stem the decline in anglo school population. The request for a return of DPS to local control was also a reflection of Reagan Administration policies toward forced busing and integration. The settlement of a prolonged desegregation lawsuit in Pasadena, California,[216] and a desegregation agreement between the Bakersfield, California school system and the United States Department of Justice, lifted the Board's expectations.[217] Two weeks after its resolution to seek court discharge, the optimism of the Board was dampened by the decision on bilingual education which, among other things, did not separate the language issues from the desegregation ones.[218]

The Board filed a formal motion on January 19, 1984 for entry of three orders: 1) a declaration that the DPS was a unitary system with respect to faculty, staff, transportation, extracurricular activities, facilities and composition of student body; 2) a modification and dissolution of the injunction relating to the assignment of students to schools; and 3) a declaration that the remedy previously ordered in the case to correct the constitutional violation had been implemented and that there was no need for continuing court jurisdiction.[219] In its request for an evidentiary hearing on the motion, the District stated it would show its compliance with the six criteria for a unitary system of *Green*[220] and the working definition in the court's Memorandum and Opinion dated May 12, 1982.

In support of the motion, Board attorney Michael Jackson stated

215. *Keyes*, 540 F. Supp. 399, 404 (D.C. Colo. 1982).

216. Branscombe, *Move to End Court Hold on Schools Blasted*, Denver Post, Dec. 17, 1983, at 1.

217. Spangler v. Pasadena City Bd. of Ed., 611 F.2d 1239 (9th Cir. 1979).

218. *Voluntary Desegregation of Schools Divides Bakersfield, California*, N.Y. Times, Feb. 12, 1984, at I, 28 col. 1; *U.S. Shifts Tactics on Desegregation of Lower Schools*—N.Y. Times, Jan. 26, 1984, at I, 1 col. 1. The Bakersfield program used meet schools. The Pasadena School system also ended court oversight despite continued difficulty in reaching racial guidelines At this time, the Denver Board added out-of-town counsel who had been successful in settling the Pasadena litigation.

219. *Keyes*, 576 F. Supp. 1503, 1521-22 (D. Colo. 1983).

220. *Keyes*, 609 F. Supp. 1491, 1492-93 (D.C. Colo. 1985).

that the school district was firmly committed to the maintenance of a non-discriminatory educational program. He pointed out the 1976 Pasadena decision, in which the court ruled that a pupil assignment order could be dissolved, even though there may have been other issues regarding the unitary character of the school district which had not been resolved.[221] Plaintiffs' counsel Gordon Greiner objected. He said that it had been two years since the court, with obvious reluctance, put in place the present pupil assignment plan:

> Obviously, the Court did not sign off on the plans passing constitutional muster. Nothing has changed. The plan was flawed then. It is still flawed. There were fifteen schools that didn't meet racial balance projection that fall. I think for the board to come in here, knowing these circumstances, and ask for an evidentiary hearing is nothing but a waste of time.[222]

Greiner introduced evidence showing that the fifteen schools were more racially unbalanced in 1982 than previously projected, and that they were still more unbalanced in 1983.[223] The court summarily denied the Board's motion to separate the bilingual issues from the desegregation ones.

FEDERAL INTERVENTION

On February 8, 1984, the Board received a boost when the Department of Justice moved to intervene as *amicus curiae*. This was the first time that the Justice Department had intervened in a private, i.e., citizen filed, desegregation case. The Department said it would intervene in cases in which court-ordered busing was in effect only upon the school board's request. However, the Denver Board never formally requested the Department to intervene, nor voted to do so! The Board president, Naomi Bradford, on her own initiative, requested Justice Department intervention.[224] The Justice Department decided to intervene after the Board unanimously resolved to ask Matsch to declare the system unitary. The Court permitted intervention.

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221. Green v. County School Board, 391 U.S. 430, 435-37 (1968).

222. The January hearing is reported in: Branscombe, *Hearing Set on Halting Busing Order*, Denver Post, Jan. 21, 1984, at 1.

223. *Id.*

224. Under the Court's guidelines, schools were out of balance if Anglo students did not comprise between twenty-four and fifty-four percent of the student body.

THE DEFENDANT'S POSITION

The position of the School Board was:

> Once a school district has complied with a constitutionally acceptable court-ordered remedy that is designed to desegregate the system in the full sense, and has maintained substantial compliance with that remedy for a sustained period of time, the school district is entitled to be declared unitary unless there have been intervening acts of discrimination.[225]

The Department of Justice concurred.

The prime thesis of this argument was that the 1974 Final Judgment and Decree, as modified in 1976, was a complete remedy for all of the constitutional violations found in the case and adequate to desegregate the school district. If the Board has implemented this plan and refrained from unconstitutional segregative acts, "pupil assignment unitariness will have been demonstrated and the District Court must end its supervision of pupil assignments." As each of the criteria for a unitary system was fulfilled, the defendants theorized, that that aspect could be removed from court supervision. One major issue, bilingual, bicultural education, stood clearly in the way of the defendant's theory.

V. SIDESHOW: THE BILINGUAL BICULTURAL ISSUE

In the United States Supreme Court Decision involving *Keyes*, the Court in 1973 had ordered trial of the factual question of whether the Denver School Board's policy of deliberate segregation in the Park Hill schools constituted the entire school system as a dual system.[226] It formally recognized that hispanics suffered many of the same economic and cultural deprivations as blacks, and that petitioners were entitled to have schools with a combined predominance of Blacks and Hispanos included in the category of segregated schools.[227]

Upon remand to the District Court, the Congress of Hispanic Educators (CHE) and 13 Mexican American parents, represented by the Mexican American Legal Defense and Education Fund (MALDEF), filed a motion to intervene which was granted by Judge Doyle on Jan-

225. Branscombe, *Matsch Allows Intervention*, Denver Post, Feb. 10, 1984, at 1A.
226. *Keyes*, 609 F. Supp. 1491, 1498 (C.D. Colo. 1985).
227. *Keyes*, 413 U.S. 189 (1973).

uary 11, 1974.[228] The intervenors wanted: 1) equitable treatment in any desegregation plan; b) employment discrimination remedied; and c) the desegregation order to protect and enhance bilingual programs.[229]

THE CARDENAS PLAN

The special interests and needs of Hispanic children had been addressed in 1974 in a part of the Finger Plan. This section of the Finger Plan had been developed by Dr. Jose Cardenas, an expert witness of the plaintiffs. The Cardenas Proposal was "premised on the theory

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228. *Id.* at 197-198.

229. The intervenors brought their claims as a class action under Rule 23(b)(I) and (3) of the Federal Rules of Civil Procedure and asserted claims under the Fourteenth Amendment, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964. FED. R. CIV. P. 23(b).

> Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

U.S. CONST. amend. XIV provides in part: ". . . . [No state may] deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C.A. § 1983 (West 1985 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d (West 1985) provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

that the poor performance of minority children in public schools resulted from 'incompatibilities' between the cultural and developmental characteristics of minority children on the one hand, and the methods of expectations of school system on the other."[230] Because most school systems were operated to meet the needs of middle class anglo children, schools inevitably failed to meet the differing needs of poor minority children.[231]

The Cardenas Plan, therefore, required an overhaul of the school system's entire approach to educating minorities. Its proposals extended to matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation staffing, non-instructional service and community involvement. It also included a mechanism for comprehensive monitoring of the program's progress.[232] The Cardenas proposals touched all aspects of curriculum planning, methodology, and philosophy that normally was the responsibility of local school authorities.[233]

The plaintiffs contended that inclusion of the Cardenas Plan in the court's order was justified on either of two grounds. First, the plan was necessary to achieve meaningful desegregation in the schools. The separation of races alone was not enough. School authorities also had to establish a receptive scholastic environment for minority students in order to eradicate the very evil at which *Brown* and subsequent cases were directed; that is, isolation of minority students in an essentially alien school system.[234] The second justification for the Cardenas Plan corrected the Board's failure to provide an equal educational opportunity for minority children. The plaintiffs argued that this failure, which the district court had found in an earlier phase of the case,[235] was a separate violation of the Fourteenth Amendment to which the Cardenas Plan was reasonably directed.

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230. Roos, *Implementation of the Federal Bilingual Education Mandate: The Keyes Case as a Paradigm*, p. 3, unpublished paper on file, the Institute of Judicial Administration, Inc. [hereinafter cited as Roos].

231. *Keyes*, 521 F.2d 465, 480 (10th Cir. 1975). *See supra* at p. 15.

232. *Id.*

233. Because the school system itself "lacked[ed] accountability," continuing evaluation would be conducted by ten "Equal Educational Opportunity Committees," each composed in part of persons from outside the school system, if necessary, according to the plan. *Id.*

234. *Id.* at 480-81. "The plan suggested specific courses in the curriculum, adoption and publication of specific educational principles, provision of early childhood education commencing at age three and adult education for minorities."

235. *Id.* at 481.

The circuit court felt that the lower court's adoption of the Cardenas Plan overstepped the limits of its remedial powers.[236] The district court had made no finding on remand from the Supreme Court that either the school district's curricular offerings, or its method of educating minority students constituted illegal segregative conduct. The district court did conclude that since "many elementary school Chicano children are expected . . . to acquire normal basic learning skills which are taught through the medium of an unfamiliar language," a meaningful desegregation plan must provide for the transition of Spanish-speaking children to the English language.[237]

Offering a lesson in judicial restraint, the circuit court vacated the lower court's acceptance of the Cardenas Plan, because it went beyond merely removing obstacles to effective desegregation and helping hispanic children to reach the proficiency in English necessary to learn other basic subjects:

> Instead of merely naming obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far.
>
> Other considerations led us to the same conclusion. Direct local control over decisions vitally affecting the education of children 'has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process' . . . Local control permits citizen participation in the formulation of school policy and encourages innovation to meet particular local needs.[238]

The court concluded that the District Court's adoption of the Cardenas Plan would "unjustifiably interfere" with state and local attempts to deal with the problem of educating minority children.[239] The implication of plaintiffs' arguments in support of the Cardenas Plan, the court concluded, was that minority students were entitled under the Fourteenth Amendment to an educational experience tailored to their unique cultural and developmental needs. "Although

236. *Id.* at n.17.

237. *Id.* at 483.

238. *Keyes*, 380 F. Supp. at 695.

239. *Keyes*, 521 F.2d at 482. The court cited 1973 COLO. REV. STAT. § 22-1-103 in which Colorado policy is to encourage local school districts to develop bilingual skills and to assist in the transition of non English speaking children to English.

enlightened theory may well demand as much, the Constitution does not,"[240] concluded the court. It remanded the bilingual issue for a determination of the relief, if any, necessary to insure that hispanics and other minority children would have the opportunity to acquire proficiency in the English language.

The circuit court decision meant that if a hispanic community wished to piggyback a language order into a desegregation ruling, it had to establish that English language deficiencies were a product of unlawful segregative acts. Also, entire schools could not be maintained as segregated in the name of bilingual education while the school system is under court order to desegregate. However, the decision did allow some degree of clustering to maintain administratively viable language programs.[241]

For nearly four years efforts to negotiate a resolution of the English language proficiency issues were unsuccessful.[242] The intervenors had little leverage, and the school district little interest in reaching a settlement.[243] On November 3, 1980, the plaintiff intervenors filed a supplemental complaint in intervention adding a claim under a provision of the Equal Educational Opportunities Act of 1974 (EEOA) and the Colorado English Language Proficiency Act (CELPA).[244]

THE STATUTORY FRAMEWORK: THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974

The EEOA was a political reaction by the United States Congress to the use of busing as a means for mitigating the effects of segregation from the operation of a dual school system. Section 1701 of EEOA includes a specific statement of support for neighborhood schools.[245]

240. *Id.* at 482-83.

241. *Id.* at 482.

242. Roos, *supra* note 309, at 6-7.

243. *Keyes*, 576 F. Supp. 1503, 1506 (D. Colo. 1983). This is the key decision involving the resolution of the bilingual issues.

244. Roos, *supra* note 230, at 7.

245. Equal Education Opportunities Acts of 1974, § 202, 20 U.S.C. §§ 1701 *et* (1978). Although the supplemental complaint indicated that the parties were the same as in the original complaint, the statement of the claims expanded the group of intervenors to "those students who are limited-English proficient" without regard to native language. The supplemental complaint contained no class action allegations. The School Board never responded to either the original complaint or the supplemental complaint. It was only on April 26, 1982 that the school district challenged the class certification. Judge Matsch supported the class certification. *Keyes*, 576 F. Supp. at 1506-08.

The act also attempts to establish more uniform guidelines than had been provided for by the Courts for dismantling dual school systems.[246] Section 1703(f) makes it unlawful for a state to deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by:

> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[247]

This was the gravamen of the plaintiff-intervenor's claim. EEOA and the Bilingual Education Act were enacted as 1974 amendments to the Elementary and Secondary Education Act, yet Congress in describing the remedial obligation it sought to impose on the states, did not specify that a state had to provide a program of "bilingual education" to all limited English speaking students. Congress's use of the less specific term, "appropriate action," rather than "bilingual education," has been interpreted to indicate ". . . that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under EEOA."[248]

In determining whether a school system is using appropriate and good faith remediation efforts, courts have utilized a three part analy-

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246. Section 1701 states:

§ 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

Equal Educational Opportunities Act of 1974 § 202, 20 U.S.C.A. § 1701 (West 1978).

247. Section 1702(a). The Congress finds that—

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

b) For the foregoing reasons, it is necessary and proper for the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

Equal Educational Opportunities Act of 1974 § 203, 20 U.S.C.A. § 1702 (West 1978).

248. 20 U.S.C.A. 1703 (West 1978).

sis: (1) is the school district pursuing a program based upon an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field; (2) is the program reasonably calculated to implement that theory; and (3) after being used for sufficient time to be a legitimate trial, has the program produced satisfactory results?[249]

The CELPA is essentially a funding statute, but it does establish an affirmative duty: (a) to identify students whose dominant language may not be English; (b) to assess such students to determine if their dominant language is not English; (c) to certify to the State Education Department those students whose dominant language is not English; and (d) to administer and provide programs for such students.[250] Colorado has not directed the use of any particular type of language program.

The statute's classification system is based upon that developed by the then Department of Health, Education and Welfare (HEW) as part of its Lau guidelines with HEW drafted as administrative recommendations following the United States Supreme Court decision in *Lau v. Nichols*.[251] The Colorado statute tracks the Lau categories, and the Denver School District uses these classifications.[252] State funding for bilingual bicultural education is computed pursuant to a statutory formula which sets limits on the funding allowed for limited-English speaking children.[253]

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249. Castenada v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981). The Fifth Circuit in *Castenada* concluded that by granting limited English speaking students a private right of action to enforce the obligations to address the problems of language barriers in the EEOA, Congress must have intended that schools make a genuine effort, consistent with local circumstances and resources to remedy the language difficulties.

250. United States v. State of Texas, 680 F.2d 356, 371 (5th Cir. 1982).

251. COLO. REV. STAT. § 22-24-105 (Cum. Supp. 1982).

252. *Keyes*, 576 F. Supp. at 1511.

253. COLO. REV. STAT. § 22-24-103(4) (Gu. Supp. 1982). Section 22-24-103(4) of the Colorado statute provides for the classification of children as follows:

> 'Student whose dominant language is not English' means a public school student whose academic achievement and English language proficiency are determined by his local school district, using instruments and tests approved by the department, to be impaired because of his inability to comprehend or speak English adequately due to the influence of a language other than English and who is one or more of the following:
>
> (a) A student who speaks a language other than English and does not comprehend or speak English; or
>
> (b) A student who comprehends or speaks some English, but whose predominant comprehension of speech is in a language other than English; or
>
> (c) A student who comprehends and speaks English and one or more other languages

THE BILINGUAL PROGRAM IN SCHOOL DISTRICT NO. 1

At the time of trial in April 1982, the Denver school district used a survey which identified 3,322 children as limited-English speaking. Of that total, 2,429 were Lau categories A and B, and 893 were Lau category C.[254] Although forty-two languages were represented among the district's limited-English proficiency children in 1981-82, the majority fell into two language groups, Spanish and one of four Indochinese languages.[255]

SCHOOL DISTRICT NO. 1'S THEORY OF BILINGUAL EDUCATION

The Denver school system elected to use what is called a "transitional bilingual approach":

> The intent of bilingual education is to facilitate the integration of the child into the regular school curriculum. English is not sacrificed, in fact it is emphasized; the nature language is used as a medium of instruction to ensure academic success in content areas such as math, social studies, etc., while the child at the same time is acquiring proficiency of the English language.[256]

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and whose dominant language is difficult to determine, if the student's English language development and comprehension is:

(I) At or below the district mean or below the mean or equivalent on a nationally standardized test; or

(II) Below the acceptable proficiency level on an English language proficiency test developed by the department.

254. *Keyes*, 576 F. Supp. at 1515. Allocated funds on a per student basis maximum amount was $400 per year in 1983 for a Lau A or B child, and $200 for a Lau C child. CELPA prohibits the funding of a student's educational program for longer than two years. COLA. HEV. STAT. 22-24-104(3) (Cum. Supp. 1982).

255. *Keyes*, 576 F. Supp. at 1151. At the elementary level (Grades K-6), 1,639 students were identified as Lau A and B and 637 as Lau C. In the secondary grades (7-12), there were 790 Lau A and B students and 256 Can C. During the 1981-1982 school year, the school district operated 117 schools—eighty-eight elementary, nineteen junior high, and ten senior high schools—with a total enrollment in grades 10-12 of 54,644 students. Lau Category A and B students in the forty-two language groups attended eighty-three of the school district's eighty-eight elementary schools. There were Lau A and B students in all nineteen of the junior high schools and in all ten of Denver's senior high schools. *Id.*

256. There were 1,851 children, or 55.72 percent of the total number of LEP students at all grade levels, whose other language was Spanish. The second largest group, comprising 36.48 percent of all LEP children, consisted of 1,212 children who spoke one of four Indochinese languages. *Id.* at 1511-12. "The languages were Cambodian (116), Aug (417), Lao (174), and Vietnamese (505). At the elementary level, 919 Spanish language students were identified as Lau A and B, which represents 2.8% of the K-6 population. At the time of the trial, eighty percent of the Spanish language Lau A and B children were in grades K-3. At the junior high level, 146 Spanish language A and B students were identified, representing 1.07% of the junior high school population. At the senior high school level, the survey identified 86 Spanish language A and B students or two-thirds of one percent (.67%) of the senior high population. District-wide the

A bilingual program is what the name implies. Teachers or aides who speak English and Spanish can teach subjects such as mathematics, social studies, and science in Spanish at the same time the children are learning English. Students placed in bilingual classrooms participate with the rest of the student body for classes in art, music, and physical education—and for lunch and recess. The pupils then lose no learning time compared to their English speaking schoolmates.

Ideally, every child would be taught by teachers fluent in the student's native language. However, the number of foreign languages spoken in the school district, 42 at the time of trial and 52 in 1984, made it impossible to find a sufficient number of fluent teachers. As a result, most non-English speaking children were enrolled in English as a Second Language Programs (ESL). In elementary schools these programs were run by part-time or "travel" teachers who visited several schools one or two days each week. The certified bilingual teachers were aided by native language tutors or interpreters. The theory was to start non-English speaking children in small groups of four to eight. As they learn to speak, write, and read English, they are moved to larger classes with certified teachers. When they are able to function in regular class, they are placed there.[257]

THE DENVER BILINGUAL PROGRAM IN 1982

At the time of trial, a transitional bilingual program existed at 12 elementary schools.[258] Most of these schools had one designated bilingual classroom for each grade level in the program. More Spanish speaking children than others benefited from bilingual classrooms.[259] Because of the dearth of certified teachers, no non-Spanish, non-English speaking children, nor any Spanish-speaking "Lau C level" children received instruction in designated bilingual classrooms.[260]

Spanish language A and B population K-12 totaled 1,151 or 1.9% of the total district enrollment. An additional 700 Spanish language students were identified as Lau category C."

257. Intervenors Exhibit 26 *cited in Keyes*, 576 F. Supp. at 1516.

258. Branscombe, *Bilingual Pro-am Evolving: English Taught the 'hard way'*, Denver Post, Jan. 16, 1984, at 5A.

259. At eleven of the schools, the program was for grades K-3. At the twelfth, the program ran from grades K-6. Not all classrooms in these twelve schools were designated bilingual classrooms.

260. While only 13.4% of the total number of limited-English proficiency children enrolled in the district (Lau A, B and C children, including all forty-two language groups) were receiving instruction in bilingual classrooms during 1981-82, 31.03 percent of the total number of spanish

There were differences in the teaching staff in the desegregated bilingual schools. Each bilingual classroom was taught by a certified teacher, but many of those teachers spoke only English. Most teachers, including all of the monolingual English teachers, had a bilingual aide to assist in communication. In several designated bilingual classrooms, there were full or part-time ESL tutors who assisted in English language instruction. In other classrooms, ESL was taught by teachers and aides.[261] The children who were not in designated bilingual classrooms received ESL instruction from a full time ESL teacher or from tutors who instructed ESL.[262] All ESL instruction, whether by a teacher or tutor, occurred on a "pull-out" basis: the children were taken from their regular classrooms to receive from thirty to sixty minutes of ESL instruction each day.[263]

At the secondary level, there was no program comparable to that found in the designated bilingual elementary schools. The principal program for secondary level limited-English proficiency students was ESL taught by teachers and tutors for about forty-five minutes each day. At four of the district's 30 secondary schools, ESL instruction was not available.

One of the central aspects of the bilingual suit was the status of

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speaking, elementary level limited-English speaking children were in bilingual classrooms. *Keyes*, 576 F. Supp. at 1512.

261. The bilingual classrooms were intended to have about forty percent limited-English proficiency children, and sixty percent English proficient children, but the actual figures deviated from this goal.

262. *Keyes*, 576 F. Supp. at 1512. "In addition, each bilingual school, except for Mitchell, had a bilingual resource teacher who serves in an administrative and supportive role. (Del Pueblo and Valdez have two bilingual resource teachers, while Bryant-Webster and Greenlee have half-time bilingual resource teachers.) The resource teacher's duties are extensive, including: coordinate between the classroom teacher and the aide in establishing an instructional program; provide technical and other assistance to bilingual classrooms; coordinate the total bilingual effort within the school; meet weekly with the teachers and aides to discuss student progress and other program concerns; provide at least two hours of in-service training to the aides weekly; develop curriculum and materials; involve parents and the community in the program; assess and evaluate limited-English speaking children; diagnose their needs and prescribe specialized curricula; demonstrate techniques and methodologies involved in bilingual instruction; second language acquisition, ESL, and Spanish oral language development; read to children in Spanish; and work with children on conceptual development using the child's native language. All the bilingual resource teachers are bilingual."

263. There were approximately 1200 children, 500 who were Spanish speaking, in Lau A and B categories who did not receive bilingual education. For all but the four elementary schools which had a full-time ESL teachers and for all the non-Spanish speaking Lau A and B children in the twelve bilingual schools, instruction was by full or part-time tutors.

the Lau C level children.[264] These children, with home language backgrounds other than English, comprehended and spoke English, but did very poorly on reading and writing tests. An important issue in *Keyes* was whether DPS had a legal obligation to provide such students with special language assistance. The school district's position was that these students were simply low achievers. DPS's only responsibility was to provide the same programs offered to other low achievers.[265] The intervenors offered expert testimony to show that a student could have minimally acceptable oral proficiency, while suffering an impediment in writing and reaching skills owing to his non-English home language background. The intervenors argued, and the court agreed, that the failure to address the reading and writing deficiencies was a denial of equal educational opportunity and a violation of section 1703(f).[266]

TESTING

The identification of limited-English speaking children, and the placement of those children in Lau categories A, B and C, did not occur through a formal testing process, but through a questionnaire that was filled out by each child's parents and reviewed by a teacher. If the parents and teacher concurred that the child was not limited-English speaking, the district determined him to be ineligible for the bilingual/ESL program.[267]

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264. The school district's fifty-five tutors served Lain A and B children in seventy-five elementary schools, generally meeting with groups of two to four children at one time, and tutoring an average of twenty children per six-hour day. For the rest of the day, the chid received content instruction in the regular classroom, entirely in English. Some regular classroom teachers were bilingual and the child could receive some content instruction in his native language through those teachers. The elementary ESL program used the "IDEA Kit," which employs pictures, actions and other materials to teach Lain A and B children oral skills in English. *Keyes*, 576 F. Supp. at 1513.

265. Roos, *supra* note 230, at 11.

266. *Id.*

267. An October, 1981 survey identified 146 Spanish A and B Category students in the junior high schools. Of this number 121 or 82.8% attended schools with ESL programs, and 108 of the 121 (89.2%) had bilingual teachers instructing them. In the senior high schools, 78 of the 86 identified Spanish speaking Lain A and B students had ESL programs available. In addition, 316 A and B students in other identified language groups attended schools with structured ESL programs. *Keyes*, 576 F. Supp. at 1513.

In addition to the specific ESL programs, course materials in content areas of American History, geography, physical science, natural science, mathematics, sex education, health and hygiene, and general hygiene had been translated into the five major language groups for use in

Parents commonly overstated the language abilities of their children. While the teacher's involvement was intended to safeguard against that, most of the district's teachers were neither trained in linguistics, bilingual education, other languages, or in detecting language problems. Testimony was introduced of the subtle pressures that existed within the school system to overstate a child's English language skills, which served to minimize the District's obligations to address bilingual needs, particularly when they were difficult and expensive to meet. Many teachers were philosophically opposed to bilingual programs.[268]

The school district used standardized tests to measure the progress of elementary school children receiving bilingual and ESL instruction. If the student scored well on the test, he would graduate from the ESL Program unless his tutor or teacher determined that it would be inappropriate to mainstream him at that point. No records were kept of the progress of children who had left either the bilingual or ESL programs. Nor was continuing support provided to students who exited from either program. The district did not compare their performance against that of non-limited English speaking children. Nor did the tests used by the district measure the capabilities of limited-English speaking children in their native languages in either language skills or content areas.

STAFFING

Teachers in designated bilingual classrooms were placed by the school district's personnel office, rather than by the bilingual program administrator. These placement decisions did not depend upon the teacher's proficiency in a second language or in bilingual instruction skills. The personnel office often assigned tenured teachers, or teachers already working within a particular school, to fill vacancies in bilingual classrooms, even though those teachers were neither bilingual, had no training for bilingual teaching, and non-tenured bilingual teachers were available.[269] During the 1980-81 school year, more than

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the school curriculum. Materials had also been translated for use in the home economics, physical education, and industrial art areas. *Id.*

268. At the secondary level, those students who were identified as LEP were given an ESL test to place them in ESL levels I, II, III, or IV. Roos, *supra* note 230, at 10.

269. *Keyes*, 576 F. Supp. at 1513-14. At the secondary level, the school district measured

two hundred of the district's teachers—predominantly teachers who did not lead designated bilingual classrooms or teach ESL—received an eighteen hour in-service training course.[270]

PROGRAM GROWTH AND FUNDING

The Denver Bilingual Program, the subject of the 1983 litigation, began in September 1980. The number of bilingual teachers had increased from three to 36 at the time of trial in 1982, tutors from 12 to 72, an increase from seven to 11 schools, and placement of 17 tutors in addition to the regular classroom teachers and full-time ESL teachers in 27 secondary schools.[271] During this period, the school district's funding for bilingual and ESL instruction increased from $139,326 in 1979 to $1,293,625.[272]

JUDGE MATSCH'S 1983 OPINION ON THE LANGUAGE ISSUES

On December 30, 1983, Judge Matsch issued an opinion on the bilingual issue.[273] The Court specified that while the opinion was directed toward the bicultural issue, the analysis was made in the context of a desegregation case which had been in the court for more than a decade.[274] Joining the desegregation to the bilingual issues made easier the resolution of the latter.

The Court applied the tripartite analysis to the § 1703(f)

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progress in the ESL program through the Structure Test of English Language (STEL). The test was administered twice each year.

270. *Id.* at 1514. There is no state endorsement for bilingual classroom teachers. Selection is based on oral interview. The district did not administer a written test to evaluate either language skills or bilingual instruction skills. No special training or state certification was required for ESL teachers. Nor were ESL teachers required to be bilingual.

271. The training course covered the basics of linguistics, ESL (including the IDEA Kit curriculum), and multicultural awareness. The school district did not follow up on whether those teachers actually used such training in their classrooms; nor did the school district know whether those teachers taught in classrooms or schools with large numbers of limited-English speaking children. *Id.*

272. *Id.* at 1515.

273. In 1982 this figure was over and above the salaries of the regularly assigned teachers in the program. In 1981-82, the district received a $81,687 federal Title VII Computer Demonstration Grant, Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d, $137,200 under the Transition Act for Refuge Children, and $991,137 in State funds. *Id.* at 1515.

274. *Id.* at 1503 (D. Colo. 1983). The judge said the delay stemmed from the difficulties involved in using the adversary process to assess the efforts made by a public 'school district to achieve a unitary school system.

claims.[275] It held that Denver "transitional bilingual approach" was a recognized and satisfactory educational theory.[276] However, the court found the school district in violation of § 1703(f) when it applied the second prong of the analysis—whether Denver pursued its bilingual program with adequate resources, personnel, and practices. Teachers assigned to bilingual classes often lacked the necessary skills and were not given training to develop them. Assignments often were based on seniority.[277] Another criticism by the court was that bilingual classes were available only at 11 elementary schools, and that only students who spoke Spanish and lived near one of those schools were assigned to the bilingual program.[278] Other concerns were the reliance on oral skill,[279] the disregard of any special curricular need of the Lau C level children,[280] and the lack of adequate tests to measure the district's results.[281]

The third prong of the *Castenada* analysis, whether the Denver transitional bilingual program achieved satisfactory results, is the most difficult because it raises qualitative issues of measurement. Again, Judge Matsch sounded the clarion of judicial restraint:

> It is beyond the competence of the courts to determine appropriate measurements of academic achievement and there is damage

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275. *Id.*

276. *See* text *supra* at n.248.

277. *Keyes*, 576 F. Supp. at 1516.

278. Teachers were designated as bilingual on the basis of an oral interview. There were no standardized testing procedures. The assignment of bilingual teachers was based upon seniority, the same procedure used for all other assignments. Thus, an English speaking only teacher who passed an oral interview and had seniority would have a preference to fill a vacancy in a bilingual classroom at bilingual schools, even though a qualified bilingual teacher with less seniority was available for placement there. *Id.* The ESL component was taught by ESL designated instructors who received little training and were not subjected to any standardized testing. Some had no second-language capability. The tutorial program relied upon professionals who had second language skills, but were not required to show competence or experience with content area knowledge, or teaching techniques. *Id.*

279. Most students with limited-English proficiency were not in those classes and attended schools without a bilingual program. "Lain A" and "Lain B" children were receiving no content instruction in a language which they understood. Some secondary students from certain schools were brought together for extended ESL services at the Fred Thomas Center. This approach is called clustering. *Id.*

280. *Id.* at 1518. ESL instruction was limited to forty minutes per day of remedial English instruction using an audio-lingual approach.

281. Lain C children are those who comprehend and speak English and another language, whose dominant language is difficult to determine, and whose English language proficiency is below national or district standards. *See supra* at p. 58. These children were given no remedial English language programs, in violation of the Colorado statute.

> to the fabric of federalism when national courts dictate the use of any component of the educational process in schools governed by elected officers of local government.
>
> Fortunately, it is not now necessary to discuss this question because of the findings of the district's failure to take reasonable action to implement the bilingual education policy which it adopted.[282]

The court commented upon two indications of failure in achieving equal educational opportunity: (1) the number of hispanic dropouts and the relationship between the sharp decline of Lau C level students between grades 7-9 and 10-12, and (2) the use of "levelled English," or watered down handouts for LEP students in the secondary schools, an indication that LEP students had failed to obtain a reasonable parity of participation with other students.[283]

In ordering a remedy, Judge Matsch brought the languages issues into the mainstream of the desegregation litigation. He did not order a discrete remedy for the language issues, but linked their resolution to the creation of a unitary school system. The failure to remove the language barriers was a failure to establish a unitary system.[284] Only a changed attitude by the Board and greater institutional commitment to equal educational opportunities would suffice. The Board said the court had to have a broader focus than forced busing. The language issues were related to the other aspects which made up the requirement of a unitary school system. As Matsch attempted to draw the Board away from its fixation with busing, he squarely placed the responsibilities for remedying the bilingual program on elected officials.

OPPOSITION TO THE BOARD'S MOTION

Judge Matsch's December 1983 decision on the bilingual issue militated against the Board's January 1984 motion for a declaration that DPS was a unitary system and that previously ordered remedies ended the need for continued court supervision. Opposition to the Board's motion soon surfaced. On February 15, 1984 lawyers for the bilingual intervenors filed a brief stating that until all vestiges of segregation, including differences in achievement between minority and

282. *Keyes*, 576 F. Supp. at 1518.
283. *Id.*
284. *Id.* at 1519.

white students were eliminated, the court should deny the District's motion that the schools be declared integrated.[285] The plaintiffs pointed to evidence of continuing segregation and argued that the school district should exhaust all practicable remedial alternatives before it could be considered integrated. Leaders of three public service organizations: the Denver Public School Improvement and Accountability Committee; the Denver League of Women Voters; and the Denver County Parent, Teacher, Student Association, urged the Board to "openly articulate" to the public its commitment to equal educational opportunity. Among the relevant questions which the Board had never answered, according to representatives of the three organizers, was "whether there is a basis for believing, with reasonable certainty, that there will be freedom from racial discrimination in the future."[286]

On April 10, 1984, the Board unanimously approved resolution 2233, a declaration of policy which was intended to follow the termination of court supervision. The 18 paragraph resolution stated that the Denver schools should be operated in conformity with all federal laws, that "there shall be no sudden alteration of the court ordered busing plan then in effect," that no practices would be taken for the purposes of discriminating against any person, that the Board would attempt to achieve the beneficial effects of integration, that the beneficial effects of integration are most fully realized in stabilizing integrated neighborhood schools, and that the Board "shall preserve contiguous attendance zones for schools that are integrated and shall establish contiguous attendance zones wherever it appears that stable integration can be maintained in the schools serving such areas."

The resolution committed the Board to developing additional magnet schools and special programs, using all available means to ensure that they would be integrated. In addition, the Board said it would develop and actively promote a voluntary program to encourage students to transfer to schools where their race is a minority.[287]

Nationally recognized desegregation experts felt there was little

285. *Id.* at 1521-22.

286. Burling, *Continued Supervision Urged for Denver schools*, Rocky Mountain News, Feb. 16, 1984, at 8.

287. Branscombe, *Groups Seek DPS Resolve on Equality*, Denver Post, Mar. 10, 1984, at 7A.

chance of convincing the Court that the system was unitary. Some of the problems of the district, including the failure to stay within court ordered reduced racial quotas in 27 of the 108 schools, the shortage of minority teachers, the high minority dropout rate, the gap in majority-minority achievement scores, and the number of one race classrooms were cited in local newspaper accounts.[288]

THE APRIL 1984 HEARING

In addition to its new counsel, Chicago attorney Phillip Neal, the Board retained John Michael Ross, a Washington statistician who had prepared evidence for the hearings leading to the Pasadena settlement. Ross, who was paid nearly $200,000 for his efforts, offered complex testimony that only served to confuse Matsch.[289] Using a detailed series of graphs, indices, and tables, he testified that the district had come close to achieving racial balance. Ross then admitted, however, that judges had not relied on statistics to declare other districts desegregated.[290]

Ross's statistics attempted to show that extensive movement of population within Denver, and a steady and large decline in enrollment—almost all of which represented a loss of anglo students—were the prime causes of racial imbalance in certain schools.[291] Matsch criticized the Ross presentation for failing to give a complete picture of the demographic movements of Denver residents, particularly those

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288. Branscombe, *School Board Will 'Promote Integration'*, Denver Post, Apr. 11, 1984, at 4A.

289. Enda, *Busing: Race Gap Persists, Experts Say*, Rocky Mountain News, Apr. 15, 1984, at 1. Gary Orfield, the expert witness in several desegregation cases, including Denver's stated:

> I think it will get thrown out. The judge has thrown out an effort by the school district to get out from the court order before. He was obviously very impatient then [in 1982]. He threw it out one day after the evidence was presented.

He described the school district's motion as "a provocative and stupid thing for them to do . . . a slap in the face of the judge." *Id.*

290. Branscombe, *School Board Claims Data Proves its Full Compliance*, Denver Post, Apr. 17, 1984, at 4A; Enda, *Judge Puzzled by Consultant For DPS Plan*, Rocky Mountain News, May 12, 1985, at 19. Roos was paid $119,825 on a per diem arrangement that claimed from $400 per day to $500 by May 1985. He also received $37,078 for travel and clerical expenses and spent $37,462 for computer time. These expenses, along with the legal fees, when made public became an embarrassment to the Board.

291. During the hearing Matsch hid neither his confusion or annoyance: "I have a negative understanding of this exhibit," Matsch declared at one point. At another: "the excitement level is just too intense," and he adjourned for lunch. Enda, *Judge Puzzled by Consultant for DPS Plan*, Rocky Mountain News, May 12, 1985, at 19.

who lived in Denver in 1975, but moved away before 1980.[292]

In his opening statement Greiner said that there had been substantial problems for the last two years with the Board's compliance with court decrees in such fields as affirmative hiring, pupil assignments and disproportionate disciplining of minority students. He termed the "consensus" desegregation plan "a disastrous step backward for minority students." He also offered a new school assignment proposal, requiring additional busing for eleven elementary schools.[293] This would desegregate the four elementary schools with the fewest anglo students of any in the city. On May 23, the last day of the hearings, Matsch denied the plaintiff's new busing plan on the ground that the racial imbalances at the four schools were "chronic, not acute." He felt that the desegregation efforts at the four elementary schools should await resolution of the larger issues in the case.[294]

As the hearing developed, the chances of the Board's succeeding on its motion lessened. Board members' testimony did not help their own case. Omar Blair, the only black member of the Board, told the court:

> I believe we've been under court order long enough. I think the turmoil and trauma has caused the district to lose a lot of its students almost to the point of no return.
>
> Second, the only way I know to find out whether we're unitary, and if not why not, is to bring the question to this court.

Under cross examination, Blair admitted he did not sufficiently trust his colleagues on the Board to seek or maintain desegregation. He believed that racist practices still occurred in schools, and that the three new members of the Board had nearly destroyed the credibility of the district by wresting authority from the superintendent.[295] Blair suggested that the court allow plaintiffs' attorney, Gordon Greiner, to "say each year whether [we have] done what we said we'd do."[296]

Judge Matsch questioned board member Paul Sandoval: "About the school with a twelve percent Anglo population, you said you

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292. *Keyes*, 609 F. Supp. 1491, 1508 (D.C. Colo. 1985); Weaver, *Busing Triggered White Flight? Truism Being Debunked by Experts*, Denver Post, Apr. 14, 1985, at 6E.

293. *Keyes*, 609 F. Supp. 1491, 1508 (D.C. Colo. 1985).

294. Branscombe, *Plaintiffs Offer Enlarged Busing Plan*, Denver Post, Apr. 26, 1984, at 1A.

295. Branscombe, *More City School Busing is Denied*, Denver Post, May 24, 1984, at 1A.

296. Branscombe, *DPS Release From Court Control Urged*, Denver Post, Apr. 20, 1984, at 4A.

wouldn't be concerned about that so long as the program is equal?" Sandoval replied, "where children go is a parental right." Matsch responded, "you understand that the Supreme Court has told us separate is unequal?"[297]

Two other members of the Board testified that they voted to seek relief from court ordered busing without knowing or having asked whether the segregative violations had been corrected. When Board vice-president Franklin Mullen was questioned by Norma Cantu, attorney for bilingual intervenors, about whether the Board had ever requested standardized achievement scores to be broken down by ethnicity, Mullen responded that he didn't put much stock in standardized test scores.[298]

The hearings promoted criticism of the school system's efforts at desegregation. Former school board member Kay Schomp criticized the use of magnet schools by the system because they siphoned off anglo students from schools with low anglo enrollments, and thus were detrimental to the schools that pupils had left behind.[299] A father of a child is an extended day program at one of the city's magnet schools testified that he and other parents had confronted "an institutional wall" of resistance to the efforts to improve and expand the school's academic and parent involvement program.[300] Carol Ruckel, President of the Denver Parent Teacher Student Association, testified that parents used the hardship transfer system to get their children into a neighborhood school in order to avoid busing, but the Board failed to consider the racial effects of such transfers. School administrators corroborated Ruckel's charge.[301]

The court-appointed desegregation experts testified that the Board had been unresponsive to their efforts to help develop and im-

297. *Id.*

298. Branscombe, *School Officials Disagree as Judge Weighs Decontrol,* Denver Post, Apr. 21, 1984, at 1A.

299. Cantu then asked whether Mullen recalled that one of the original complaints in the case was that some minority schools had low standardized test scores. "That's something everybody is concerned about," he responded. Mullen admitted he had never received a list of low achieving schools before voting on the resolution. Branscombe, *Board Member Didn't Know if Bias Violations Ended,* Denver Post, Apr. 26, 1984, at 3A.

300. Branscombe, *Magnet Schools Hurt Integration, U.S. Court Told.* Denver Post, May 8, 1984, at 4A.

301. Branscombe, *School Board Shunned Offers, Expert Says,* Denver Post, May 9, 1984, at 9.

plement a plan to end court control of the system. Willis Hawley said that his dealings with the school board and administrators left him "at least skeptical" of the Board's commitment to maintain a desegregated school system. Hawley testified that he wrote several letters to Michael Jackson, school board attorney, offering to collaborate on the court-appointed tasks and proposing plans and programs for discussion. Seven months went by before he even received any response to his letters.[302] Another court-appointed expert, Charles V. Willie, a professor of education and urban studies at the Harvard Graduate School of Education, cited data showing that the faculty in 48 of the district's 108 schools was grossly unbalanced racially, and testified that: "Denver schools have never achieved a unitary affirmative action [employment] system." Willie called Denver's record "abominable".[303]

In the final brief, Greiner argued that the district was not fully integrated, and that court supervision should not end until the district had: submitted plans for desegregating the three most racially imbalanced elementary schools; revised its hardship transfer policies; and evenly distributed black and hispanic teachers throughout the district's schools. He also requested a permanent injunction ordering the district: 1) not to operate a dual school system; 2) to construct schools and create magnet schools so as to promote integration; 3) administer hardship transfers so they would not hurt desegregation; 4) to continue affirmative action policies in the hiring, transferring, and assignment of minority faculty and administrators; and 5) to keep annual racial and active records on student enrollment, faculty, and staff and hardship transfers.[304] In its final brief, the Congress of Hispanic Educators claimed the district's gifted and talented program was racially identifiable as a program for whites and reinforced disparities in treatment of hispanics and other minorities.[305]

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302. Branscombe, *Ma-et Schools Hurt Integration, U.S. Court Told*, Denver Post, May 8, 1984, at 4A.

303. Branscombe, *School Board Shunned Offers Expert Says*, Denver Post, May 9, 1984, at 9. Hawley said beginning March 4, 1983 he and Charles Willie sent a series of letters to Michael Jackson, Board attorney, offering cooperation and suggesting DPS staffers be appointed to work with the panel. He received no answer at all until October 11 and no answer in any way responsive until November 2, 1983.

304. Branscombe, *Denver Schools Not Desegregated, Court's Expert Says*, Denver Post, May 10, 1984, at 7A. Willie also testified about the board's lack of response to compliance assistance panel initiatives. *See supra* at 16.

305. Bingham, *Permanent School Bias Ban Urged*, Denver Post, Dec. 23, 1984, at 4A.

The Board's final brief said that only three of the district's 108 schools did not meet the original court's test for integration. The percentage of anglos at any school must be within 15 percent of the percentage of anglos in the entire district.[306] The Board argued that the number of anglo students had declined from 48 percent in 1975 to 39 percent in February of 1985. No one could force anglo students to stay in the Denver schools, and the school district's desegregation plan did not have to be changed to integrate schools that anglo students leave. On February 19, 1985, the Justice Department filed its brief in support of the Board's position.[307]

By the beginning of February 1985, the settlement talks had broken down. There were not substantive discussions for nearly three months. Greiner claimed the stalemate resulted because the district failed to respond to plaintiff's proposals.[308] The sticking pint, as it had been in the past, was the racial imbalance of four elementary schools—Mitchell, Barrett, Harrington and Gilpin—the most segregated in the district. A lack of communication and consensus over board strategy emerged. The vice-president, Franklin Mullen, said the school district's failure to negotiate was "inexcusable."[309]

In the middle of February 1985, the Board switched gears and publicly announced that it had instructed its counsel to move more aggressively toward an out of court settlement of the lawsuit.[310] At the same time, a new superintendent, James Scamman, who had overseen desegregation in South Bend, Indiana, had been selected. The Board's negotiating posture was much more conciliatory than its final brief had indicated. It presented a compromise plan for integration of the elementary schools. "It's the same thing we rejected five months ago," responded Greiner.[311] The two sides did not meet until the end of March.

306. Bingham, *DPS Segregation Claimed*, Denver Post, Jan. 8, 1985, at 4A.

307. The plaintiffs claimed that twenty-nine of the 108 schools were below the guideline.

308. Bingham, *Brief Opposes Desegregation Plan Update*, Denver Post, Feb. 20, 1985, at 3A.

309. Enda, *Talks to End DPS Suit Breakdown*, Rocky Mountain News, Feb. 3, 1985, at 6.

310. *Id.* He also criticized Jackson for not updating the Board on the negotiations. "We pay enough to legal fees to get full-time service." Jackson cited the need to file a final brief and the search for new superintendent in justification of his inability to negotiate.

311. *School Board Seeking Speedy Suit Settlement*, Denver Post, Feb. 15, 1985, at 8B.

CHANGES IN THE LITIGATION ENVIRONMENT

The middle of May 1985 brought several changes in the environment of the lawsuit. First, the new superintendent of schools became more actively involved. Second, public criticism had arisen over the costs of the litigation and the fees spent for court experts.[312] An indicator of this change was the May 21st school board election for two school board seats, which resulted in anti-busing advocate William Schroeder's defeat and a change in the political balance of the Board.[313] In addition, two liberals were elected: Edward Garner, a marketing specialist who became the only black member of the Board, and Carol McCotter, a former teacher. Garner said that he would stop spending money fighting desegregation in the courts:

> What we have to do is follow the dictates of the court and hope it won't be unpleasant for all . . . the board has never bought into the idea of promoting desegregation. Unless we do, we will always be faced with expensive appeals.[314]

Of those elected during the 1970s, when busing was the major issue, only Naomi Bradford remained.[315] Another indicator that the "political" climate of school board elections had changed was that only seven percent of the voters turned out, less than half of the usual 15 to 18 percent turnout for an off year Denver school board election.[316]

During the course of the hearings, negotiations were proceeding

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312. Bingham, *Board to Offer Integration Plans for 3 Schools*, Denver Post, Feb. 21, 1985, § 5, at 3.

313. Enda, *Judge Puzzled by Consultant for DPS Plan*, Rocky Mountain News, May 12, 1985, at 19.

314. Instead of focusing upon busing, the issue of the seventies, candidates concentrated on reversing the poor image of the schools. The new code phrase was "quality of education". The support of the Denver business establishment seemed to reflect the change in emphasis. The Denver Board of REaltors did not endorse William Schroeder, a member of their organization, as they had six years before when he ran as an anti-busing candidate. Nor did they gain support Mary Baca, who ran unsuccessfully in 1983 on an anti-busing platform. No one openly ran against busing.

315. Bingham, *Garner, McCotter Win Denver School Election*, Denver Post, May 22, 1985, at 1A.

316. Edgar Benton, whose views on integration cost him his seat on the school board in 1969, said busing continues to be an issue in the mid-1980s, albeit one that's below the surface. "I think, for example, this upcoming May 1985 election for the board of education that if someone were to run and would say many very kind things about the school desegregation program in Denver . . . that person would not be elected. That's not an absolute theorem." Nor did former school board member Kay Schomp believe the busing issue would disappear soon: "I don't think it'll change until it becomes moot. I assume that as long as there's a court order, there are going to be people who run against the court order." Benton Interview, *supra* note 51.

favorably toward a settlement of the bilingual issues. Realizing they would lose on their motion to declare the district unitary, the Board began to seriously negotiate a settlement which would end the suit and make certain the district would be subject to no additional busing after the resolution of the bilingual issues. On the other hand, the plaintiffs wanted to ensure that a settlement would not decease any of the desegregation programs in place, particularly busing and, a most difficult problem, desegregation of a few racially-unbalanced elementary schools.[317]

REACTION TO THE DECISION

Unlike the posturing that followed other court opinions involving pupil assignments, the Board's reaction to the December 1983 decision on bilingual education issues was muted and responsive. One reason for the change was the Board's mid December 1983 application to the court for the system to be declared unitary and the court to relinquish control over the school district. Board President Naomi Bradford, a staunch anti-buser, said she was "not overwhelmed by the opinion" and that the decision was not completely negative. She hoped to get the school district to move quickly with acceptable proposals for a January 20, 1984 court hearing. Bradford felt that the bilingual program merely needed fine tuning.[318]

By January 5, 1984, at the time the Board was prosecuting its motion to end the desegregation aspects of the lawsuit, the school district's staff members unveiled a series of proposals to improve the bilingual program. The proposals included: (1) the creation of clusters of elementary schools from which LEP pupils would be bused to a central location and given instruction in English as a second language, (2) expansion of the English tutoring program at individual high

317. In suburban school elections where desegregation has not been an issue, only one to two percent of the electorate usually votes. Bingham, *Garner, McCotter Win Denver School Election*, Denver Post, May 22, 1985, at 1A.

318. Branscombe, *School Plaintiff Talks Aim at Busing Freeze*, Denver Post, Oct. 2, 1984, at 1A. Negotiations continued through the fall of 1984, but then stalled. Greiner refused to negotiate and prepare a final brief at the same time. After receiving two extensions on November 28, 1984 an impatient Matsch refused to give him additional time to file his brief. Bingham, *Desegregation Suit negotiations Stalled*, Denver Post, Nov. 17, 1984, at 7A. Matsch wanted to render his decision during the then-current school year to permit the district time to implement changes in pupil assignments before the start of the next school year. Greiner was ordered to file his final brief by December 18, 1984. Bingham, *Extension Denied in DPS Busing Case*, Denver Post, Nov. 29, 1984, at 8A.

schools; and (3) a commitment of the Board to seek ways to keep the seniority provisions of the union contract from preventing the assignment of bilingual teachers to bilingual schools.[319] The suggestion of busing elementary students out of their neighborhoods to a central school split the Board's anti-busing majority. Paul Sandoval was the only anti-buser who opposed the idea—on the ground that it would further segregate students—and would therefore, be opposed by the court. Sandoval was isolated and undercut by his anti-busing allies. the momentum toward resolution of the language issue was the hope, unrealistic in retrospect, that resolution of the bilingual problems would prove that the school system was not unitary.

RESOLUTION OF THE BILINGUAL ISSUES

Board President Bradford's comments about the bilingual decision were read by the plaintiff-intervenors as an opening. As board president, she was considered crucial to any resolution of the dispute. Immediately after the decision, the plaintiff-intervenors, led by Peter Roos, an attorney with the Mexican-American Legal Defense Fund, met with the Board and advised Judge Matsch that the parties would like to attempt to negotiate a settlement and work things out themselves rather than presenting alternative plans in formal judicial proceedings.

Initially, Roos had hoped to build an elaborate committee system, identifying issues and building a plan from the bottom up. That approach did not work.[320] Instead, a committee was established composed of clients, parents, interested people, and hispanic teachers in the school system. Through this committee, a proposal was developed for board consideration.

At the outset, Roos made a determination to insist that the school district's representatives include members of the Board and its president:

> I had been through too many negotiations with school officials and found them blown apart at the board level.[321]

The Board established a committee on limited English proficient

319. Lundstrom, *School Board to Act Fast on Ruling*, Denver Post, Jan. 3, 1984, at 1A.
320. Branscombe, *Bilingual Program Changes Proposal*, Denver Post, Jan. 6, 1984, at 1B.
321. Telephone Interview with Peter Roos, Counsel for plaintiff intervenors (Sept. 18, 1985).

students composed of Bradford, the Board's president; Judy Morton, chairman of the Board's education committee; Paul Sandoval, board member; James B. Bailey, deputy superintendent of schools; Michael Jackson, counsel for the school board; Terry Marshall and Dale Vigil, consultants.

The committee met with the plaintiffs regularly, sometimes without counsel present. Their agenda included the identification of eligible participants, personnel, elementary and secondary school programming, and the unique linguistic and cultural needs of the Indochinese LEP students.[322] The negotiators met every two weeks, sometimes more frequently, through the spring of 1984 until June, when a report to the board of education, "A Program for Limited English Proficient Students," was published and became the basis for the August, 1984 out-of-court settlement.

According to Roos, the negotiations were non-adversarial. The parties worked hard toward reaching a settlement. Roos felt that if the plaintiffs demonstrated honesty in their approach, were open to Board suggestion and not hung up on ideology, a settlement could be achieved.

In presenting plans, the plaintiffs argued for good educational programs and accountability—items that also mattered greatly to the board members. They attempted to assuage the Board's concerns. Both parties shared the belief that many bilingual programs were "mostly fluff". Thus, the final settlement had extensive testing and accountability provisions. The plaintiffs saw the settlement plan as an opportunity for Denver to achieve a model program which would be on the cutting edge of bilingual-bicultural education.

Judge Matsch played a background role. The parties met several times with him. When establishing the negotiations, the parties agreed that a report to Matsch would be submitted every month. However, Matsch had an important backup role which gave leverage to the plaintiffs. If the negotiations fell through, the plaintiffs could always return to court to hold more formal hearings. This approach was later used successfully by the plaintiffs in the desegregation portion of the lawsuit. Because the Board wanted to settle that part of the lawsuit,

322. *Id.*

the negotiations proceeded smoothly. Agreement was reached in the spring and the suit was settled in August, 1984.

MATSCH'S DECISION: JUNE 3, 1985

On June 3, 1985, Nearly eighteen months after the Board filed to dismiss the lawsuit, Judge Matsch denied the defendant's motion.[323] Reviewing the history of the lawsuit, the court highlighted the years of the Board's intractability and lack of commitment to remedying the constitutional violations; the acceptance by the court of the consensus plan in 1982; and the well-founded reservations because of the Board's lack of commitment to a unitary system;[324] the Board's lack of compliance with the Tenth Circuit's requirement that the district assign personnel so that in each school the ratio of minority-to-Anglo staff not be less than fifty percent of the ratio of minority teachers to staff of the entire system;[325] the failure to develop a policy to distribute neutrally the number of minority teachers throughout the district;[326] a hardship transfer program which functioned as the equivalent of a "voluntary transfer program" for neighborhood schools and had a resegregative effect;[327] and a failure by the Board to keep records as to the effects of the transfer program on transferor or transferee schools.

The court held "that the law of the case was the 1974 final judgment and the decision was not an adequate remedy for segregated school assignments."[328] The court pointed to the Board's failure to work cooperatively with the Community Assistance Panel and, contrary to what was represented to the court and community, the adoption of a secret agenda in hiring new counsel and an expert witness to convince the Court to terminate the lawsuit.[329]

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323. Roos, *supra* note 230, at 20.

324. *Keyes*, 609 F. Supp. 1491 (D. Colo. 1985).

325. *Id.* at 1507.

326. *Keyes*, 521 F.2d 465, 484.

327. The court found that schools with a high percentage of minority teachers were in predominantly minority areas.

328. *Keyes*, 609 F. Supp. at 1512. The proposal measures for hardship transfers were babysitting needs in the elementary schools and work opportunities for students in high school. Students would transfer to schools closer in their neighborhoods.

329. *Id.* at 1499.

THE FUTURE OF THE COURT'S JURISDICTION

The court also indicated it would retain jurisdiction until it was convinced that there was no reasonable expectation that constitutional violations would remain—whether or not the school system should be found unitary.[330] Even accepting the defendant's argument that the modified 1974 final judgment and decree were complete and adequate remedies, the court's jurisdiction would continue because it was compelled to conclude that resegregation was inevitable if the school board followed the Colorado constitution, which prohibits busing.[331] Board Resolution 2228, modeled after a resolution offered in the *Spangler* case, reaffirmed the Board's commitment to a unitary system. However, as 15 years of litigation demonstrate, a unitary system. However, as 15 years of litigation demonstrate, a unitary system would be impossible without mandatory busing.

If court jurisdiction ended, the school board, unless it was to be in direct violation of the Colorado constitution, would have to dismantle the school assignment and busing programs.[332] The court placed little reliance on Resolution 2228 or in any other resolution binding future boards.[333] The *Keyes* case had commenced after a board resolution was repealed by a succeeding board. Thus, with the uncertainty of the legal requirements as to when a school district is unitary, and the anti-busing provision of the Colorado constitution, the court would not dismiss the case. Whenever *Keyes* ended, the court would issue a final injunctive order.[334]

Judge Matsch pointed out that any final injunction was civil in nature and did not have to be specific as to pupil assignments, percentages, faculty ethnicity, or even commitment to transportation. What the court would require was the development of a decision-making

330. *Id.* at 1505.

331. *Id.* at 1514.

332. The Constitution of the State of Colorado expressly prohibits the use of such busing in the following language of the "anti-busing" amendment, adopted in 1974:

> No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

Colo. Const. art. IX, § 8. It is the Supremacy Clause of the United States Constitution, art. IV § 2 that permitted the operation of the Denver schools under the existing busing plan which otherwise was a clear violation of the Colorado Constitution.

333. This distinguished the Denver case from *Spangler*, where no such provision existed.

334. *Keyes*, 609 F. Supp. at 1520.

structure for local government authorities, and assurance that those who make such decisions had adequate information and provided for minority participation to act in concert with the principles of equal educational opportunity.[335] The court explicitly cited the Ad Hoc Committee's guidelines as a useful working framework within which such a structure could be developed. It requested the parties to come together to negotiate to settle the lawsuit and develop a consensual final order. Because of the recent school board election and the hope that a new environment had emerged, the court declined to set a specific timetable.

THE SUMMER OF 1985: STUMBLING TOWARDS SETTLEMENT

On June 7, 1985, four days after the decision was issued, lawyers for both sides conferred with Superintendent of Schools James Scamman. On the weekend of June 9th, Scamman and the Board met at a retreat to develop goals and a negotiating strategy to settle the lawsuit. The new superintendent, who had experience in developing the type of monitoring system Matsch said was needed, publicly indicated that he would play a greater role in the negotiations than his predecessors.[336] However, any settlement proposed by him would have to be approved by the Board in an open meeting.[337]

The Board and Scamman, hoping to reach a mutually agreeable settlement which would be presented jointly to the court at the end of June,[338] drafted new educational goals to resolve the case. Once again, strategy changed as the Board focused upon educational rather than legal issues. The goals which were aimed at assuring equal educational opportunity for all students included: transferring teachers to

335. The Fifth Circuit, which has probably had the greatest experience in school desegregation cases, requires a court to retain jurisdiction for three years following judicial determination that a school district is unitary. This assures that determination of unitary status is not premature. In that period, the district files semi-annual reports with the court. At the end of the three years a hearing is held at which plaintiffs may show cause why the case should not be dismissed. The district court then makes a final determination as to whether the district has achieved unitary status and at that time may dismiss the case. *See* Roos v. Houston Independent School Dist., 699 F.2d 218 (5th Cir. 1983); United States v. Texas Educ. Agency, 509 F.2d 192 (5th Cir. 1975).

336. *Keyes*, 609 F. Supp. at 1521.

337. Bingham, *Denver School Chief Opens Talks to Settle Desegregation Suit*, Denver Post, June 8, 1985, at 1A.

338. Bingham, *Scamman Mandate: Speed End to Lawsuit*, Denver Post, June 11, 1985, at 22C.

reduce the number of schools dominated by minority faculty and students; reviewing "hardship transfers"; creating magnet programs;[339] improving teacher training and sensitivity; establishing an independent committee of community representatives for various ethnic groups to monitor desegregation; and using computers to track the individual progress of students.[340]

On June 21, 1985, eight days before counsel were to meet again with Judge Matsch to discuss the development of a process to achieve settlement, Scamman announced he would reassign 40 teachers and review 1,000 "hardship" student transfers. In the fall of 1985, as a first step towards meeting the objections raised by the court, 13 schools with the most obvious racial imbalance would have teachers reassigned. Denver board member, Franklin Mullen, said the transfers were part of the Board's strategy of dealing with the schools rather than with the courts.[341] About the same time, the Board announced that it was developing a comprehensive data bank which included information on faculty and student racial balances in all schools and on programs within schools, to monitor integration.[342]

Despite visible efforts and verbal commitments by the Board to come to terms with the June decision, it was silent on the most difficult issue: the integration of three still substantially-segregated elementary schools—Barrett, Mitchell, and Hampton.[343] At the hearing on June 28, 1985, no settlement proposals were presented to the court; nor did the judge offer any guidance. The purpose of the hearing was to determine the parties' respective positions and to gauge the possibilities of settlement. According to James Nabrit, associate counsel for NAACP Legal Defense Fund:

We first began out of court negotiations last fall. We agreed we

339. Bingham, *DPS Drafts Bold Goals to End Integration Suit*, Denver Post, June 13, 1985, at 1A.

340. On September 24, 1985 Denver was awarded a 3.9 million dollar grant for magnet schools. Bingham, *Denver Awarded 3.9 Million for Magnet School*, Denver Post, Sept. 24, 1985, at 3A.

341. Enda, *School Board Plan Misses on Key Issues*, Rocky Mountain News, July 11, 1985, at 7. Other goals included curriculum reviews for more personalized learning plans for elementary students, reduction of class sizes and the dropout rate. Bingham, *DPS Drafts Bold Goals to End Integration Suit*, Denver Post, June 13, 1985, at 1A.

342. Enda, *Desegregation to Transfer 40 Teachers*, Rocky Mountain News, June 21, 1985, at 7.

343. The data monitoring system was developed by educators at Indiana University. Bingham, *Data Bank will Monitor City School Integration*, Denver Post, June 22, 1985, at 1A.

> would not reveal to the judge the details of the negotiations . . . The judge wants it that way. This is still a lawsuit, and if he has to rule on it, he'll do it the traditional way.[344]

In early July, 1985, the Board offered plaintiffs a settlement proposal. It did not, however, include a plan to end the racial isolation of the three elementary schools. Nor would the Board agree to a permanent injunction. The Board had earlier offered to shift students to balance the three schools racially, but retreated from that position.[345] Matsch told the attorneys to report to him on a monthly basis regarding their efforts to end the litigation.

The desegregation of the three elementary schools returned to Judge Matsch on October 15, 1985, when plaintiffs moved the court to direct the defendants: to file plans for the desegregation of the three elementary schools; to file a proposal for the modification of "hardship transfers" and their monitoring for segregative effects; and to direct defendants to file with the court their proposals for the modification of the policies relating to the assignment, monitoring and reporting of minority faculty to bring the district into compliance with the 1974 order.[346] Board member Franklin Mullen, arguing that the district had done its best to desegregate the schools, responded: "You can't keep changing the goalposts."[347]

On October 29, 1985, Matsch ordered the Board to integrate the three schools and to issue guidelines to ensure even distribution of minority faculty and to monitor hardship transfers. At the end of November, the Board introduced its plan to integrate the three schools by establishing them as magnets to offer Montessori classes for kindergardeners and first graders. New computer centers, reduced class sizes, and pilot programs of various educational methods would be introduced along with drama, music, dance, after-school-programs

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344. Barrett was the focus of the original lawsuit in 1969. Bingham, *Board Hopes for New Integration Guidance*, Denver Post, June 27, 1985, at 5A.

345. Bingham, *Lawyers in Denver Integration Suit Told to Keep Talking*, Denver Post, June 29, 1985, at 1C.

346. Board member Mullen stated:

> In terms of ethnic, numeric ratios, that is, for the most part, a passe issue. We're working on the things that are more qualitative and have more equity in the services and distribution of staff.

Enda, *School Board Plan Misses on Key Issues*, Denver Post, July 11, 1985, at 7.

347. Joint Motion of Plaintiffs and Plaintiff-Intervenors, Civil Action No. C-1499, filed Oct. 15, 1985, a copy is on file at the Institute of Judicial Administration, Inc.

art, and Spanish as a second language. The cost of the programs was estimated at one million dollars. Concurrently, the Board appealed Matsch's decision on the Tenth Circuit.[348]

On Sunday, December 15, 1985 the case was almost settled during a four hour negotiating session between Greiner, lawyers for the school board, and the board members. The Board hoped that active judicial supervision of the school system could be ended. Under a proposed compromise plan, the plaintiffs accepted a slightly modified version of the Board's one million dollar plan to integrate the Mitchell, Barrett, and Harrington elementary schools by enhancing their educational programs. Plaintiffs would not have called for additional busing or boundary changes. The school district would have been able to remove itself from active court supervision as soon as the three largely minority schools were at least thirty percent anglo. The Board would drop its appeal of Matsch's June, 1985 opinion and would agree to a permanent court order that would require DPS to maintain bilingual schools, not to create racially identifiable schools nor to resegregate the district, and to continue faculty integration.[349]

There were two sticking points. One was the language that the Board could not create one race or racially identifiable schools. The other was that the Board wanted assurance that it could be declared a unitary district and be released from court order.[350] Despite the inability to reach agreement on a settlement, the sides seemed to move closer together and be more conciliatory.

On Saturday, March 15, 1986, Judge Matsch ruled DPS could implement its plan to integrate the Mitchell, Barrett and Harrington elementary schools. He noted that the district had not come up with guidelines for determining when integration had been achieved, but felt that the district had complied with his October order to submit plans to desegregate the three elementary schools, to deal with transfer policies that increased one-race schools, and to set guidelines to better distribute minority faculty.[351] The court requested briefs to detail

348. Bingham, *Formal Ruling Sought on School Integration Case*, Denver Post, Oct. 16, 1985, at 14.

349. Bingham, *3 Schools Unveil Integration Plan*, Denver Post, Dec. 3, 1985, at 1B.

350. Bingham, *Desegregation deadlock broken?*, Denver Post, Dec. 15, 1985, at 1A. Bingham, *Desegregation issue still plagues schools*, Denver Post, Dec. 16, 1985, at 1A.

351. Bingham, *Desegregation issue still plagues schools*, Denver Post, Dec. 16, 1985, at 1A.

what guidelines should be used to determine that integration had been achieved and the system was unitary.

The jostling between the plaintiffs and defendants continued. The district wanted the judge to give up his supervision of DPS and declare that the school system has fully complied with previously issued integration orders. Plaintiffs requested court supervision for at least three more years, in part because Judge Matsch had not issued a final ruling, and the efforts of the school board were inadequate to make the system unitary. Plaintiffs requested additional relief through more specific directions to implement the decree and the entry of additional orders for detailed monitoring and reporting requirements.[352]

On February 25, 1987, Judge Matsch issued a ruling relaxing court control over the Denver public schools.[353] However, since the district had chosen not to increase the amount of busing to integrate the school system for fear that it would have a destabilizing effect, but utilized more subtle methods to achieve a unitary system, the court would retain jurisdiction to insure that the methods were effective.[354] The court rejected the plaintiff's request for detailed monitoring and reporting requirements because the district would probably conduct such data collection and monitoring itself, to convince the court that the system was unitary and that court supervision should end. Judge Matsch stated that a permanent injunction was the logical conclusion to the lawsuit, because the court had the responsibility to define the duty owed to the plaintiffs by the defendants. A final injunctive order was also necessary because of the proscription against student transportation to achieve racial balance in the Colorado constitution,[355] and it would protect those who might be adversely affected by Board action. The court considered the defendant's argument that a final permanent injunctive order would be inappropriate because the Board

352. Bingham, *Judge gives board OK on integrating 3 Denver schools*, Denver Post, Mar. 16, 1986, at 1B.

353. *Keyes*, 653 F. Supp. 1536, 1538-40 (D. Colo. 1987); Corcoran, *DPS wants ruling from higher court*, Denver Post, Apr. 8, 1986, at 1B. The plaintiffs argued that the District should have only two years to meet its goals of tightening transfers and integrating the three elementary schools, and if integration did not improve by the Fall of 1987, to develop alternate plans. They wanted the District to make specific orders for detailing monitoring and reporting. Bingham, *Brief urges jug to keep school role*, Denver Post, Apr. 22, 1986 at 1B. *Keyes*, 653 F. Supp. at 1539.

354. *Keyes*, 653 F. Supp. 1536 (D. Colo. 1987).

355. *Id.* at 1540.

cannot bind future boards. The court agreed and stated that was exactly why there had to be a permanent injunctive order.[356] The court directed that it would meet with counsel to discuss necessary modifications in the existing orders, a time frame for the district to prove the effectiveness of its new programs, and the text of the final injunction.

At the present time, the parties are working on the language of a permanent injunction. In April, 1987, the Board adopted new guidelines to redefine integration for the schools. The guidelines deal with more than racial balance between schools, but within schools and within special programs as well. The guidelines were a response to Judge Matsch's criticism that previous guidelines were neither specific enough nor a guide to future action.[357] In November, 1987, the district will prepare to report to the court on the effectiveness of its programs. School board members, however, have not agreed to withdraw the appeal of the June 1985 decision from the Tenth Circuit.

THE SETTLEMENT OF THE BILINGUAL ISSUES

A settlement of the bilingual issues was accepted by Judge Matsch in August 1984. The bilingual settlement focused on student identification, assessment and reclassification, selection and qualification of personnel, elementary and secondary curricular programming, and special attention to non-Spanish language minorities.

The identification process was to begin with a home language questionnaire. If the questionnaire completed by the child's parents indicated that the child's first language was other than English at home or that a language other than English was spoken in the student's home, he would be referred for assessment.[358] A fundamental programmatic determination was that LEP students should be placed in bilingual classrooms to the maximum extent feasible.[359]

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356. *Id.* at 1541. *See supra* note 278.

357. *Id.* at 1542.

358. Bingham, *Schools set rules to curb racism*, Denver Post, April 8, 1987 at B1, col. 5.

359. Each student was to be given an oral proficiency test by a person proficient in English, and wherever possible, in the student's home language. If the student was determined by the test to be LEP, or his English skills were so limited that testing was inappropriate, then he would be classified as Lain A or B.

Students identified as those with Limited English Proficiency who were above the second grade would be given a written test. If their score fell below the thirtieth percentile at the elementary level or the fortieth Percentile at the middle level and high school level, the student was classified as Lau C.

The result of improved identification and assessment techniques, put into effect even prior to the settlement of the dispute, was to raise the number of students classified as LEP from 4,000 to 8,300.[360] The school system was required to publish an accurate census of LEP students by October 15th of each school year. The classification process was improved so that if a child was reclassified as English proficient, and parents disagreed with such classifications, due process procedures were introduced.

SELECTION OF BILINGUAL PERSONNEL

A unique feature of the Denver plan is that the bilingual classroom is primarily defined by the skills of the teacher. Unlike the situation at the time of trial, where seniority under the school district's contract with the teacher's union was the sole criterion for selection as a bilingual teacher, the settlement mandated bilingual teachers be certified through their passage of the New Mexico Test of Spanish Language Skills. The settlement also requires the district to train bilingual and ESL teachers. An elaborate preference system has been created which will determine the designation and classroom assignments of bilingual and ESL teachers.[361] Strong pressures have been placed upon teachers to obtain certification and to take in-service training. Teachers hired under the preference system, who were not qualified bilingual teachers, have to engage in a course of study leading towards qualification within two years. If the teacher fails to become qualified, he loses his position.[362]

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360. Roos, *supra* note 230, at 22. If a student scored poorly on a test and came from a non-English home language background, the student would be given access to a classroom where he would receive special help. Students between the thirtieth and fortieth percentile at the elementary level were to be evaluated by a committee to determine whether the student should be classified as LEP. *Id.* at 23. Denver Public Schools, Report to the Board of Education, A PROGRAM FOR LIMITED ENGLISH PROFICIENT STUDENTS (June, 1984) [hereinafter Report]. The assessment sought to determine if there were learning problems related to speaking, understanding, reading, or writing.

361. Bingham, *20 Schools are going bilingual*, Denver Post, Oct. 13, 1984, at 1A.

362. Both bilingual and ESL teachers have to possess a basic teaching credential, and must have completed the approximate course hours required for state endorsement. The bilingual teacher, in addition, must establish language skills through a standardized test. Non-English language skills are merely desirable for the ESL teacher. Roos, *supra* note 230, at 24.

ELEMENTARY SCHOOL PROGRAMMING

The elementary school program required bilingual programming for Spanish proficient students when a sufficient number are present in a particular school. For speakers of the fifty-one other languages,where the number of students at an individual school do not justify a bilingual program or qualified teachers are unavailable, a meaningful English language development program such as ESL is required. A unique aspect of the Denver settlement is that the *school's* number of Spanish speaking children, rather than a class's number, triggers the program.[363]

In addition to schools identified as bilingual schools, at least one school in each zone was to be designated as bilingual whenever at least three grade levels in the zone had ten or more LEP students of the same language.[364] The settlement also contained detailed provisions on curriculum development and implementation requiring the same skill level and curriculum content as required of non-bilingual students. Regular assessment of student progress was also to be required.

LEP students who are not in a bilingual classroom were to be given intensive English as a second language assistance for a minimum of thirty percent of the school day, or two hours, whichever is greater. Lau C students were to be provided with ESL for a minimum of ten percent of the school day, or one hour, whichever is greater. The student-teacher ratio in ESL programs was set at no greater than 15 to one.[365] A district-wide advisory committee was established with one parent representative from each designated bilingual school and one

363. The unqualified teacher as well had to show steady progress towards qualification, or his position would be lost. Under the settlement, a teacher with the lowest preference—a lack of oral proficiency in a second language—will be transferred from the bilingual program at the end of any semester in which a teacher with a higher preference becomes available. Nor would any teacher be assigned to a designated bilingual classroom if a teacher with a higher preference was available. Report, *supra* note 360, at 7.

364. Roos, *supra* notre 230, at 25. Schools will be designated as "bilingual schools" if K-6 schools have seventy or more students identified as LEP, K-3 schools have forty or more students identified as LEP, and K, 4-6 schools have thirty or more students identified as LEP. Report, *supra* note 360, at D15.

365. Any school that has sufficient numbers to require a program (approximately ten children per grade per year) must establish a minimum of one bilingual classroom at each level. The rationale behind this approach was that a student should be entitled to a coherent coordinated program throughout his career in a bilingual program. A program that altered the entitlement based upon numbers that a given grade level would not meet this standard. Roos, *supra* note 230, at 26.

representative from each additional school with twenty or more LEP students.

THE SECONDARY SCHOOL PROGRAM

Trial testimony had indicated that secondary school level bilingual programming may be more important than at the elementary school level, because the curriculum is so much more advanced that it cannot possibly be negotiated in a language that is not easily comprehended.[366] Due to the diversity of curricula and the range of student achievement in the middle schools, the logistics involved in establishing good programs at the secondary level are substantial. The settlement provided that all LEP Spanish speaking students could be clustered at three middle schools. In any school where 30 or more students were Spanish-speaking, such students were to be instructed by a qualified bilingual teacher in the core curriculum of mathematics, science, social studies, and English.[367] Non-Spanish speaking LEP students in middle schools were to be instructed in the core curriculum by a qualified ESL teacher. The pupil-teacher ratio was to be 15 to one.

At any high school with 40 or more Lau A and B Spanish speaking students, qualified bilingual teachers were to be designated to each of the core area departments.[368] Other students were to be served by ESL teachers.

NON-SPANISH SPEAKING LEP STUDENTS

A particularly difficult problem is the breadth of languages represented in the Denver schools, and specifically the number of Indochinese students. There simply was not a sufficient number of trained teachers to establish enough bilingual programs. Three approaches were adopted for addressing the needs of non-Spanish speaking LEP students. Students were entitled to intensive ESL instruction—at least two hours each day, of small group instruction by trained teachers, for students who failed the oral proficiency assessment. One day of ESL instruction was to be given for those who were

366. Report, *supra* note 360, at B3, at B14.
367. Roos, *supra* note 230, at 27.
368. Report, *supra* note 360, at D23.

designated LEP because of low written test scores. Paraprofessional aid was to be provided on a ratio of one to 15.[369] An advisory committee for Asian language students was established to oversee this program. The district committed itself to a special effort to recruit teachers of any language wherever there existed a shortfall between the needs of students and available teachers. Utilizing services of the two Vietnamese speaking teachers in the district, a Vietnamese bilingual program was established. This program will expand as qualified Vietnamese speaking teachers become available.

As a result of the settlement, 20 additional elementary schools became designated as bilingual, for a total of 31 schools out of 81 elementary schools in the system.[370] Some of the new bilingual schools are "zone" schools to which LEP students are bused. The Board initiated a campaign to recruit more than 100 additional bilingual teachers.[371]

VI. CONCLUSIONS: THE IMPACT OF SIXTEEN YEARS OF LITIGATION ON DENVER'S SCHOOLS

How one perceives the impact of the sixteen years of litigation on Denver, and on its school system, depends upon one's attitude toward the busing remedy. Robert Crider, who served on the Denver School Board from 1971 to 1983, does not mince his words: "It ruined a growing school district," he said. Pointing to the sharp decline in anglo enrollment, which has dropped roughly from 43,000 to 20,000 since the court order took effect in 1974, Crider firmly believes that busing was not the way to redress past wrongs in the Denver Public Schools, advocating instead the use of magnet and neighborhood schools.[372]

There are other Denverites whom, though aware the remedy has had its share of problems, feel that the lawsuit, and resulting decree, have had a positive impact on both the school system and the community. Proponents of desegregation cite the increasing equality and quality within the whole school system, saying that the lawsuit af-

369. *Id.* at 19.

370. Report, *supra* note 360, at 12-13.

371. Bingham, *20 Schools are Going Bilingual*, Denver Post, Oct. 13, 1984, at 1A.

372. Bingham, *4300 More Denver Pupils Need Bilingual Aid*, Denver Post, Oct. 19, 1984, at 2A.

fected the whole school system by making people aware for the first time of the differences in the qualify of education provided in different schools; by teaching people from different backgrounds and cultures to live with one another[373] with less fear; and by promoting a better understanding between the races.[374] Schools should prepare students for life as well as impart knowledge. The lawsuit has enabled students in desegregated schools to have a more realistic view of life outside of the classroom.[375]

There is general agreement that schools throughout the system have improved, and the qualify of education in Denver is much higher than before.

There has been more public examination of equipment, assignment

373. Crider Interview, *supra* note 119. Bradford contended that busing was not the proper way to desegregate a school system—a view shared by not a few Denver residents. Branscombe, *Denver School Board OKs Busing Plan*, Denver Post, Mar. 31, 1982, at 1B. during the past 16 years, the city's voters have sent many anti-busing candidates to the school board. Anti-busing candidates for public office have carved out a solid constituency.

374. Kay Schomp, whose school board career spanned the same years as Crider's, said the remedy "made it possible for the entire school district to claim quality." "It exposed the whole system," she added, "to examination of the city. Before the case, most knowledgeable people had kids in good schools. People became aware of the difference in the quality in education.

Schomp, who chaired the Ad-Hoc Committee, which developed the core of the current student-transfer plan, said the quality of education in DPS has improved since 1969. "We're now educating a more diverse population. We have made progress. We've learned to live with each other better." Schomp Interview, *supra* note 27.

In the opinion of Omar Blair, the only black on the school board during the eleven years following the court order, the remedy, for all its faults has been worthwhile: "Keyes has improved the quality of education for all kids. We've maintained and improved quality because of people in the city—parents who care about kids," he said. Problems remain, among them academic grouping that tends to resegregate students. "In some high schools, Anglos are in the accelerated classes, while the black kids are reading the funny books. That's wrong." Interview with Omar Blair, former member Denver Board of Education, in Denver (Sept. 14, 1984).

James Daniels was an elementary school principal in Denver before becoming director of long-range planning for the district. "The suit," he said, "has provided opportunity for kids with different values and cultural differences to come together. Different teachers could work with different kids."

He felt the order did not receive the backing of the entire community, a situation that filtered down and hurt the quality of education. "We should have agreed as a community to do it. We didn't," he noted, adding there was too much fighting in the press and on the school board. But, positive results have occurred. For one thing, he felt the district made "a sincere attempt" to understand and help minority needs. Daniels Interview, *supra* notre 161.

375. George Bardwell, a researcher for the plaintiffs, felt that race relations improved as a result of the litigation and the remedy. "There's less fear. There's better understanding between the races." Bardwell Interview, *supra* note 22.

Ann Casey, principal of George Washington High School, agreed that the remedy has had a positive impact on race relations. "The social tension that was there ten years ago has practically subsided," she said. "Because we're now at a point when the children who are now in high school have been together since they were in kindergarten." Casey Interview, *supra* note 163.

> of teachers and utilization of school facilities. The school district is more responsive to minorities. The disparity in assignment of teachers has been cleaned up. Equalization of facilities has been cleaned up. *Keyes* has helped minorities. It's given minorities a chance to enter the mainstream. Better opportunities have opened up for minority teachers and administrators.[376]

Of particular importance is that the lawsuit has brought the Hispanic population into the political and educational process. Former school board member Bernard Valdez claimed the suit has had a positive impact beyond the classroom, especially in the city's Hispanic community.

> I think the emotional dynamics that the court order has created—the shock of their kids going off to another school—mixing blacks and Hispanics and other minorities created a more democratic society. I think the whole community is better as a result. That's why we have a Hispanic Mayor [Tony Pena, elected in 1983]. The dynamics played a role in that.[377]

INTEGRATION WITHIN DPS

Denver public schools appear to be more integrated than they were when the lawsuit commenced. However, heavy concentrations of minorities and anglos remain in some schools. In 1969, Denver's high schools, with the exception of Manual, were predominately anglo; Abraham Lincoln high School was 85 percent anglo; East was 50 percent anglo, George Washington 94.4 anglo; John F. Kennedy 97.2 anglo; Manual (traditionally the minority high school) 8.2 percent anglo;

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376. In the view of Edgar Benton, whose pro-integration views cost him his school board seat in 1969, the year the suit was filed, the remedy has ushered in a new, more well-rounded type of education for all students in the school district. He said his two daughters' both of whom attended the Denver Public Schools, benefited from an integrated setting.

> To what extent will the [students] have a more dependable, accurate and therefore more useful understanding of the reality of the society in which they are going to live and function? And I think on that score, which in my view is a very important part of educational accomplishment and maybe in a sense more important than how someone performs on a battery of standardized tests, I think in that respect desegregation has been enormously important.

Benton Interview, *supra* note 51.

377. Bardwell Interview, *supra* note 22. Denver Parent Teacher Student Association President Carol Ruckel, who credits much of the remedy's success to middle- and lower-level administrators who "really tried hard," concluded the remedy has had a positive impact, both on the schools and the community. "We haven't really seen any significant loss of quality in formerly Anglo schools and we have seen significant improvements in formerly minority schools," she said. Ruckel Interview, *supra* note 34.

North High School 61.4 percent anglo; South 91.6 percent anglo; Thomas Jefferson 94.5 percent anglo; and West High School 56.6 percent anglo.[378] Fourteen years later, in 1983, at least statistically, things had changed: Lincoln was 40 percent anglo; East, 53 percent; Washington, 38.6 percent; Kennedy, 49.3 percent; Manual, 48.6 percent; North, 27.7 percent; South, 59.8 percent; Jefferson, 59.3 percent; and West, 20.4 percent. With anglo enrollment at 38.8 percent that year throughout the school district, anglo enrollment at any particular school could, according to the court order, swing from 53.8 percent to 23.8 percent—within 15 percentage points of the district wide anglo enrollment, a rule mandated by the court. Only three high schools—South, Jefferson and West—did not meet this criterion.[379]

At the elementary school level, in 1969, many of the schools tended to be predominately one-race institutions. Of the district's 93 elementary schools that year, 42 of them were at least, and usually well in excess of, 60 percent anglo. In 1983, the number of racially isolated schools had diminished considerably, but there were still exceptions. Barrett Elementary School, for instance, was seventy-seven percent black and only 14.8 percent anglo—far below the minimum level ordered by the court. Whittier Elementary School's black enrollment stood at 63.7 percent that year, also above the court-ordered level, and Stedman's black population was 67.8 percent.[380] The district-wide black enrollment that year was 22.7 percent, meaning the highest black enrollment in any particular school should have been 37.2 percent. Also, while the schools are more integrated numerically in the mid-1980s than they were before the *Keyes* case commenced, ability grouping within schools tends to make classrooms predominately one race. This issue is just being addressed.

AN ANALYSIS OF THE BILINGUAL SETTLEMENT

Denver's bilingual program is ambitious and expensive. It offers, for the first time, the hope of equal educational opportunity for the city's students with limited English proficiency. Given that the desegregation aspects of *Keyes* have proved particularly difficult to resolve,

378. Valdez Interview, *supra* note 22.

379. Denver Public Schools, Enrollment Figures (1983). A copy is on file at the Institute of Judicial Administration.

380. *Id.*

how was a settlement of the bilingual issues, outwardly satisfactory to all parties, achieved?

From the beginning, the bilingual litigation was a lawsuit within a suit, subordinate to the larger desegregation issues. The plaintiff-intervenors' counsel tended to focus on Milliken II remedies,[381] which dealt with remediation, whereas the larger lawsuit was concerned with racial balances, ostensibly Milliken I aspects.[382] In one sense, independent resolution of the bilingual question, because it was tied to the larger issues, was more difficult. There were distinctions from the desegregation issues which enabled the creation of a consensus for resolution.

First, there was broader moral agreement to provide for educational needs of Hispanic students than for upgrading educational opportunities for black students. Indeed, many whites questioned whether education for blacks was inferior. Most whites and some blacks doubted that integration through forced busing was the best way to remedy past discrimination. On the other hand, there was little dispute that students who could not understand English were at a severe disadvantage in an English speaking classroom.[383] Even conservative board members could understand the need to teach Spanish children English. Bilingual issues did not foster the same political divisiveness as desegregation.

Another distinguishing factor was that the burden and benefit of the bilingual remedy impacted largely upon one identifiable group: limited English proficiency students. Unlike the desegregation aspects of the lawsuit, where busing and racial integration affected the lives of all students and parents in the school system, bilingual-bicultural education issues could be addressed without reassigning or otherwise dislocating majority students. In addition, the bilingual deficiencies might be cured by additional dollars, much of which would come from federal and state sources rather than from the school district. More-

381. *Id.*

382. Milliken v. Bradley, 433 U.S. 267 (1977) Milliken II, After Milliken I; 418 U.S. 717 (1974) where the Supreme Court refused to order a metropolitan integration plan, the District court ordered a Detroit-only busing plan and ordered the local board to provide a broad range of compensatory educational programs half financed by the State of Michigan. The state defendants appealed on the grounds that the order exceeded the scope of the constitutional violation. The Supreme Court upheld the District Court's order of the compensatory programs.

383. Milliken v. Bradley, 418 U.S. 717 (1974).

over, the Board did not bear the full brunt of blame for the deficiencies in bilingual-bicultural education that were pointed out in Matsch's 1983 decision. The placement of unqualified bilingual and ESL teachers in classrooms was blamed on the teachers' union contract.[384]

Nonetheless, negotiations to reach an out-of-court settlement dragged on the ten years before agreement. Resolution only became possible when the bilingual-bicultural settlement became part of a larger strategy adopted by the school board to end the desegregation suit. If the bilingual issues could be solved, the Board reasoned, settlement would be used to indicate to the court the Board's good faith, and lead to the return of the school system to the Board without judicial oversight. Ironically, although the political problems were less intractable than those relating to the desegregation issue, the attainment of improved educational outcomes resulting from settlement was perhaps more problematic. By appealing to conservative board members' desires for effective programs, the plaintiffs succeeded in instituting a bilingual-bicultural program containing provisions for accountability and assessment.

Since many of the provisions of the settlement have been introduced only recently, it may be too early to evaluate the impact of the bilingual lawsuit upon the community. However, as Bernard Valdez has suggested:

> . . . the human relations aspect of education has improved dramatically. The shock, the old status quo and the stereotypes and prejudices that all human beings had in the Denver system prior to the court order I think have [changed] and created a much better environment for a Democratic society. . .
>
> A court order has helped the Hispanic community politically in terms of changing the value systems of the whole community. In other words, parents whose kids get mixed up with other minorities are not so scared any more. After meeting parents in the school setting . . . they are not that different. We can work with them—that kind of thing.[385]

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384. In the past, hispanic students who remained in school had been thrust into "Mexican rooms" where they remained until they learned English, albeit far behind their English speaking peers. More commonly, the dropped out of school at the earliest age permitted by law. Burling, *Teaching in 2 Languages Has 1 Goal*, Rocky Mountain News, Jan. 8, 1984 at 18. *See supra* at 7.

385. *Cf. Keyes*, 576 F. Supp. at 1517. Branscombe, *Bilingual Program Changes Proposed*, Denver Post, Jan. 6, 1984, at 5B.

Clearly, the lawsuit has helped the Asian community as well.

For all bilingual communities, the lawsuit connected parents to the educational process, many for the first time. Within the school system, there is now evident a much greater sensitivity to language issues. James Scammon, the new superintendent of schools, has said that settlement on these issues is his most important task. The head of the bilingual program has a reputation as an activist, and within the system there is a higher level of visibility. Previously, the administration of the bilingual program had been located far away from the central board of education. Now its office is on the same floor as the deputy superintendent in the main building.

However, the ultimate success of the bilingual settlement will not be in bringing individuals into the political process, but in achieving educational success. Will the dropout rate of minorities decline? Will children be able to be channelled back into English language educational programs? These will be the benchmarks in the program's success.

NEW GOALS AND REALITIES

Times change. School districts do too. The primary focus of minority parents now is on the quality of education their children receive rather than where or with whom they go to school. Resource allocation is a very real concern. As Denver's demographics have changed, the northwest part of the city, largely hispanic, has suffered severe overcrowding. New pockets of racially-unbalanced schools have emerged. These schools, such as Bryant Webster, which in 1985-86 was 82 percent hispanic and only 15 percent anglo, is well below the desegregation guidelines.[386] From a legal perspective, the racial imbalance in the northwest is different from that of the schools which led to the *Keyes* suit, for it has resulted from shifting demographic patterns. As it has not been caused by either DPS or state action, these racially-imbalanced schools have not become part of the lawsuit. Nor is there a constitutional infraction.[387]

Hispanic parents, who have always had mixed views about the

386. Valdez Interview, *supra* note 22.

387. Bingham, *Hispanics protect crowded Denver Schools*, Denver Post, Dec. 8, 1985, at 1C.

integrative aspects of *Keyes*,[388] are more concerned with the overcrowding and perceived lack of quality in these northwest schools than the racial imbalance. The Mexican American Legal Defense and Education Fund, which filed suit in Los Angeles protesting against similar overcrowding and lack of resources for hispanic schools, has stated it will wait to see how DPS will reduce the overcrowding in that part of the city.[389]

For blacks, quality education within schools, no matter where children attend, has become the prime concern as well. The NAACP, the Denver Urban League, and other civic groups have formed Citizens Concerned About Quality Education.[390] Test results have shown that anglos and Asians have done as well or better on statewide or national standardized tests, but blacks and hispanics score below state an national norms.[391] The concern over quality education, imbalance of resources, and the tracking of minorities into special education are second generation problems that will concern the DPS long after this lawsuit is settled.

THE LAWSUIT AND THE SCHOOL SYSTEM

There can be little dispute that the protracted litigation has increased the school district's sensitivity and responsiveness to the educational needs of its constituents. Accompanying this has been an increase in the educational system's fairness. Throughout the system, in terms of the allocation of resources for facilities, distribution of teachers, and efforts towards those with special educational needs, the quality of education and the quantity of resources has measurably improved. There is now a sincere effort to promote equal educational opportunity. Such gains are likely to be maintained because the lawsuit has also increased DPS's accountability. The politicalization of the board has been a prime factor in the prolongation of the lawsuit because educational issues became political ones. Nevertheless, public awareness of educational issues has forced the school system to respond and to be held accountable. The lawsuit had led to an ongoing monitoring process, which has arisen as part of the settlement of par-

388. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437 (1976).

389. *See supra* note 25.

390. Bingham, *Hispanics protect crowded Denver Schools*, Denver Post, Dec. 8, 1985, at 1C.

391. Bingham, *Schooling, not busing, the issue*, Denver Post, Mar. 10, 1986, at 1B.

ticular issues. Civic groups, the plaintiffs, the court, and affected parents now require DPS to collect and report a broad range of information and to respond to parents' needs.

The political process itself has forced Board members to change their positions. The Board now stresses educational quality, rather than other issues. The lawsuit has brought minorities into the educational process, such as the Indochinese community, who had been completely ignored heretofore. The hispanic community has also become more active educationally and politically.

THE ROLE OF THE COURT

The *Keyes* case is a classic example of the following: "multi-polar" public law litigation so common in efforts of institutional reform; the sprawling and amorphous party structure; a diffused adversarial relationship intermixed with negotiating and mediating processes; the judge as a dominant figure in guiding the case; the wide range of outside experts drawn upon for support and oversight assistance; and the court as a manager of ongoing relief.[392] However, we disagree with participants in the judicial activism debate that the *Keyes* judge adopted a new activist role.[393] In the context of this litigation, the judge exercised remarkable judicial restraint. The actions of Judge Matsch in pushing the school system toward a unitary system reflect Professor Diver's view of the judge as a political power broker, alternately threatening, extolling, and pushing the educational system toward reform.[394]

As in all extended litigation, the political, legal, and in this case, the educational environment, changed during the course of the lawsuit. These changes, ranging from varying United States Supreme Court standards relating to the finding of a Constitutional fault to changing attitudes by the lower courts of their remedial capacity,

392. Bingham, *Denver Anglos, Asians did well in school tests*, Denver Post, Aug. 6, 1986, at 1A. The same results occurred on achievement tests administered by DPS as part of an academic excellence plan and more rigorous graduation requirements. Bingham, *Minorities weaker on DPS tests*, Denver Post, Jan. 14, 1986, at 1A.

393. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-84 (1976).

394. *See* REBELL & BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS (1982); Horowitz, *Decreeing Organizational Change: Judicial supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983).

served to lengthen the litigation and decrease the court's flexibility in reacting to changes.

Courts have surprisingly little leeway and flexibility in multi-polar public law litigation unless the trial judge wants to supersede the parties and either run the institution himself or through a surrogate, such as a master. Certainly, Judge Matsch did not desire to adopt this role. Unlike the picture of the activist judge portrayed by both sides in the judicial activism debate, Judge Matsch acted passively in most matters unless forced to make a decision.

When Judge Matsch took over the *Keyes* case, he told the Community Education Council, which had been monitoring the desegregation of the school system, "I'm looking forward to having a very minor role in the desegregation of the schools."[395] While the Judge was wrong on his evaluation of his role, he has been consistent in attempting to withdraw the court from oversight of the school system so long as it can be achieved by constitutional means. This case is not an example of aggressive judicial activism. Rather, it demonstrates courts' reluctance to control school systems, combined with a readiness to exercise their remedial powers in the face of a recalcitrant board of education.

Once the plan goes into effect, a court is particularly limited in its ability to change a desegregation plan, even if demographics change. People—particularly the children—affected by a desegregation plan make changes in that plan difficult. When the consensus plan in *Keyes* was adopted, even though with reservation, it developed a momentum of its own, making it difficult to change. In a sense, the real measures of a board's commitment to develop a unitary system and to get the court to withdraw from a desegregation lawsuit comes at the point where the student reassignment plan must be changed. The demographics of urban school systems are such that change is constant. Typically, immediately following the implementation of a desegregation remedy, an erosion of white students increases racial imbalance in some schools. Bureaucracies tend to favor inertia. School systems facing politically hostile reactions to increased busing are reluctant to alter an implemented plan. At some point, school boundaries must be shifted, and new groups of students bused.

395. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 64 VA. L. REV. 43 (1979).

Whether the board affirmatively attempts to implement these changes, or as in Denver, places the burden on the court and seeks to hinder and delay, change is the benchmark for ending the lawsuit. Over time, the court's flexibility seemed to decrease. The court forced the school board to make decisions which maximized integration within the constraints of the situation.

The judicial process itself operates as a facilitator of change. In *Keyes*, it freed the Board to make decisions, while allowing it to escape the political consequences. The court creates a framework for the parties to come together. Through its decisions, the court educates the Board and the public. The scope of Judge Matsch's 1985 decision demonstrates this educational function.

In the latter stages of litigation, Judge Matsch was passive, serving as a boundary. Only when the parties were unable to resolve an issue would he make substantive choices. For instance, during the hearings on the board's motion to dismiss, the plaintiffs demanded that the racially unbalanced three elementary schools be integrated. Judge Matsch demurred from ordering such a step, because he wanted it to be part of the final negotiated settlement.[396] When the issue could not be resolved by the parties themselves, Matsch ordered the solution.

The ongoing supervision by Judge Matsch is similar to that of courts in other areas of the law, such as trusts, probate, bankruptcy, and antitrust.[397] The difference is primarily in the number of people directly affected and the extent of public scrutiny of the results. Still, we suggest that the role of the judge in *Keyes* was traditional and passive. Rather than adopt a policy-making role, Judge Matsch assumed a boundary setting responsibility. The leeway and scope of the remedy was determined within limits set by the parties. In *Keyes*, the court never did control the Denver public school system. The court forced the schools to create an information system which would enable plaintiffs and the public to monitor the desegregation process. This case is not an example of the substitution of government by the federal judiciary. The court used its remedial powers to force the appropriate bodies to exercise their responsibilities, but it did not supersede them unless absolutely necessary.

396. Parsons, *The Busing Judge*, Denver Post, Feb. 5, 1984, at 1A.

397. *See supra* p. —.

This is not to suggest that the judicial process does not distort the functioning of our system of separation of powers. It does force reallocation of limited funds within the school system and external allocation of money to the educational system. The distortion is that the legislative branch has the responsibility to allocate monies.[398] The judicial process in this case served as a means of getting other branches of government and administrative agencies involved.

The lawsuit has led to the legalization of educational change in Denver. Issues which are traditionally considered of educational policy have legal overtures which may subsume the former. Educational decision-makers now focus upon the legal implications of a course of action, often at the expense of educational ones. We suggest that the courts will remain as the prime arena to work through educational policy. When additional grievances arise, they will be less likely to be resolved through the educational system. Courts will become policy mediators for future disputes. The educational system's constituents have learned that access to a court is more likely to vindicate constitutional rights and to force the educational system to change. The increasing use of the courts to settle public policy disputes is the way our political system now works in many areas, not only education.[399]

398. *See* Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 481-491 (1980).

399. See Nagel, *Separation of Powers and the Scope Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Frug, *the Judicial Power of the Purse*, 126 PA. L. REV. 715 (1978).